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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 129.

J. W. FRELLSEN & COMPANY, PLAINTIFFS IN ERROR,

vs.

J. W. CRANDALL, REGISTER OF THE STATE LAND OFFICE, ET AL.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

H. G. MORGAN,
P. M. MILNER,
Attorneys for Plaintiffs in Error.

(21,112.)

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If the court please:

With the court's kind permission we beg the liberty of adding a word to our argument.

We submit that the question of our vested right does not depend on anything to be done or not to be done by the Register of the Land Office. Our vested right can only exist or come into existence by what we did, without regard to what action, if any, the Register took.

Rights are vested as distinguished from expectant or contingent. A right is said to be contingent when it depends on an uncertain event; expectant, as, for example, when it depends upon a continuance of existing laws. An example is shown by the law of forced heirship under Louisiana law.

As our right was neither contingent nor expectant, it must be held to be vested.

The enquiry must be directed, not, as argued by counsel for defendants in error, to our remedy, as conveyed in the question, "What could you do the moment after your tender was refused?" but to the proposition, What, if anything, was there remaining for us to do in order to get our vested right? The legal status is fixed by our applications and our tenders, the latter being tantamount in law to payment.

Our application is to determine our vested right to a patent. That is all we claim. We have claimed nothing else, and acts 85 and 86 of 1906 would prevent our securing these patents. Same relief asked in Pennoyer *vs.* McConnaughy, 140 U. S., 1.

Referring to question of Justice Lurton as to whether the decision of the Louisiana court was not placed upon the statement of a general rule of law applicable to Louisiana, as well as to the United States, we respectfully answer that this court has repeatedly held that while it will respect the settled jurisprudence of a State, yet it will not accept the *decision in the case* as settling the State's jurisprudence when there are no former decisions antedating the period of time involved in the instant case.

In other words, it is not pretended that prior to March 28, 1905, the Supreme Court of Louisiana had ever announced the doctrine that a patent once issued segregates the land.

In Smith *vs.* Crandall, referred to, decided in *1907*, subsequent to our applications and tenders, the proposition was stated as in the instant case. But both of these decisions are subsequent to our applications, tenders and the acquisition of our vested rights. It is only where the law has been settled by prior decisions that the doctrine of accepting the State court's exposition of it is binding.

Respectfully submitted.

H. G. MORGAN,
P. M. MILNER,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1909.

No. 129.

J. W. FRELLSEN & COMPANY,
A Partnership Composed of Joseph W. Frellsen and James D. Hill, Plaintiffs in Error.

VERSUS

A. W. CRANDELL,
Register of the State Land Office and Others.

Reply to Brief of Defendants in Error.

We are somewhat surprised at the array of counsel on the brief of the Attorney-General, who is representing the defendants in error (not the intervenors in the case).

A reference to the transcript shows that the counsel whose names appear on the brief are the attorneys for the several intervenors.

This fact, taken together with the memorandum at

page 43 of the brief, to the effect that "Point VI, is urged on behalf of intervenors solely and is not "concurred" in "by Counsel for the State of Louisiana," justifies the conclusion that the brief is really and in fact intervenors' brief (although the intervenors are not before the Court) else the language is inappropriate, for the brief could hardly be the Attorney-General's, if he did not "concur" (?) in every part of it.

There is also a glaring unintentional inaccuracy in the little memorandum. The Attorney-General is **not** the "Counsel for the State of Louisiana" but the counsel or attorney for A. W. Crandell, Register of the Land Office, and others, for this is not a suit against the State.

We are not so much concerned with who wrote the brief as we are with what it says.

We will, therefore, examine the six (6) points made in support of the judgment of the Louisiana Supreme Court.

We assume our original brief made out our case and if we are able to break down the argument of the brief and disclose errors, fallacies, false premises, and wrong conclusions in all and every one of the "six (6) points" stated, we assume that our application will meet with favor in this Court.

I.

> "A patent to lands issued by the Land Department of the Government, is, untill annulled by judicial tribunal, conclusive against the Government, and all claiming under junior patents or titles."

This is a glittering generality to catch the unwary. We can imagine it said with a mighty roar before a jury.

In the home of the intervenors they soothe their fears by constant repetition. What is it worth before this Court?

Has this Court **ever decided** in a single case that a Patent null and void on its face, or which shows on its face the want of authority in the officer to execute, or which shows that the lands covered therein were withdrawn from sale - - - segregated the lands from the Public Domain; or that such a patent could not be treated as a nullity and collaterally attacked?

Of course not.

Why cite 8 decisions of this Court.

One decision would satisfy us and settle the question. Does this Court decide one thing to-day and another to-morrow?

At page 39 of our original brief we analyzed the decisions referred to by the Louisiana Supreme Court, and found they did not bear out this broadly stated proposition.

What becomes of the decisions cited by us from Page 42 to 47 (incl.) **in our brief?**

In other words, these gentlemen wish an effect given to the use of general language not justified by the facts in the instant case.

We can answer such contention in the language of this Court in the case of the **Northern Pacific R. R. Co. vs. DeLacy, 174 U. S. 634.** In that case the Circuit Court of

Appeals had cited the case of **Whitney vs Taylor, 158 U. S. 85,** as decisive of the case. This Court called attention to the fact that the citation from its opinion in **Whitney vs. Taylor,** was made with reference to an important and materal fact—not found in the case then at bar. In other words, the language of the Court must be construed in reference to the facts of the case under consideration.

In not a single case cited by Counsel under "Point 1" was there before the Court for consideration a patent null and void on its face. Hence the language used has no application to the case at bar - - - where we allege that "Patents that were issued" are null and void on their face.

Let us briefly examine the authorities referred to.

United States vs Thockmorton, 98 U. S. 70.

An analysis of this case shows how absolutely unreliable is a glittering generality or the broad statement of an abstract proposition and how painfully inapplicable is the citation.

That was a case in Chancery by Walter Van Dyke, United States Attorney, on behalf of the United States, against Thockmorton and others.

The object of the bill was to have a decree of Court, setting aside and declaring to be null and void a confirmation of the claim of W. A Richardson, under a Mexican grant, to certain lands, made by the Board of Commissioners of Private Land Claims in California on the 27th day of December, 1853; and the decree of the District Court of the United States, made February 11, 1856,

affirming the decree of the Commissioners, and again confirming Richardson's claim. The general ground on which this relief was asked was, that both decrees were obtained by fraud. This Court affirmed the decree of the Circuit Court sustaining a demurrer to the bill and dismissing it on its merits.

The Court said:

> "In fact, one great, if not fatal defect in the bill is the absence of any declaration of the means by which the fraud has been discovered or can now be established."

The Court then said:

> "There is another objection to the bill which, though not going to the merits, is, in our opinion, equally fatal to it in its present shape. We are of the opinion that, unless by virtue of an Act of Congress, no one but the Attorney-General or some one authorized to use him name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts on which such a patent is founded."

There was in that case absolutely no question of nullity of the patent on its face.

The object of the bill was to set aside the confirmation of Richardson's grant by the Commissioners and the affirmance of this confirmation by a decree of the United States District Court for frauds in obtaining the confirmation and decree.

This is but a sample of the inexact or inapt citation of authority which almost exhaust us by the detail and vol-

uminous writings necessary to demonstrate the fact.

McLaughlin vs U. S., 107 U. S. 526.

This case has absolutely no application to the case at bar. This was a case where the District Attorney of the United States for California, on behalf of the United States, brought a bill to set aside a Patent of the United States conveying a quarter section to a Railroad.

Acts of Congress granted alternate sections to the Railroad, but excepted such sections or parts of sections as were mineral lands.

The bill alleges that a ¼ section was mineral land, and so at the time of the grant, and was known to be so when the Patent was issued, which was so issued without authority of law by inadvertance or mistake.

The Patent itself was not in the record as an exhibit or as part of the evidence.

The defendant Railroad Companies did not appear. McLaughlin defended as purchaser two degrees removed from the Company. This Court said;

> "The whole record is so imperfect and the case so obscurely presented that we feel tempted to dismiss it."

The objection was made that the suit was not instituted under authority of the Attorney General according to principle established in case of **U. S. vs Thorckmorton, 98 U. S. 61.** This Court affirmed the decree of the Court below, in favor of complainant.

This again was not a case involving the nullity of a Patent, which nullity was shown on its face.

Western Railroad Company vs. U. S., 108 U. S. 510.

This is the same case as

McLaughlin vs. U. S., 107 U. S. 526; United States vs. San Jacinto Co., 125 U. S. 273.

This again was a suit **not** involving the question of nullity of a Patent on its face.

This case decided several things, none of them in point.

(1) It decided that the Attorney-General was the proper government officer to initiate proceedings for the annulment of a patent and to prosecute the suit.

(2) That such a suit must be brought only when the United States has an interest in the matter by being under an obligation to make a title good, but not when the purpose is to benefit one of two claimants.

(3) The alleged fraud for which it was sought to anul the patent was in the **survey** of a confirmed Mexican grant, and it was charged that the Government officers were interested in the grant.

The bill was dismissed and the decree of the lower Court was affirmed.

United States vs Stone, 2 Wall 535.

This was a case cited by this Court in the last mentioned case; and the Court quotes Justice Grier as saying;

> "A Patent is the highest evidence of title, and is conclusive, as against the Government, and all claiming under junior patents or titles, untill it is set aside or annulled by some judicial tribunal. In England this was originally done by **scire facias**, but a bill in Chancery is found a more convenient remedy."

Turnig to this case of **United States vs Stone,** we find this is a case directly favorable to our contention.

This was a case of a patent void because the land was never within the tract allowed to the Deleware Indians.

The contention was made on behalf of Stone, who had bought the land from the Deleware Indians, that the government could not attack its own patent.

Justice Grier in deciding the case made use of the quotation given above and immediately followed it by saying:

> "Nor is fraud in the patentee the only ground upon which a bill will be sustained, patents are sometimes issued inadvisedly or by mistake, where the officer **has not authority in law to grant** them, or where another party has a higher equity and should have received the patent. **In such cases Courts of law will pronounce** them void. The patent is but the evidence of a grant, and the officer who issues it acts ministerially and not judicially. **If he issues a patent for land reserved from sale by law, such patent is void for want of authority.**"

This is absolutely our contention in this case. We have always contended that however **void** these patents or certificates of entry were, we could not compel by mandamus the Register of the Land Office to ignore them and receive our money and grant us a patent, because his act was ministerial, involved a discretion which we could not control by mandamus.

Justice Grier confirms this view by continuing:

> "But one officer of the Land Office is not competent to cancel or annul the Act of his predecessor. That is a judicial act, and requires the judgment of a Court."

This case is but in line with those cited in our brief.

Mowry vs. Whitney, 14 Wall, 439.

This was a case concerning a patent for an invention.

Smelting Co. vs. Kemp, 104 U. S. 647.

This case supports our contention and is cited and quoted at length at pages 42 and 43 of our original brief.

Emblem vs. Lincoln Land Co., 184 U. S. 660.

This case is analyzed by us in our original brief pages 40 and 41.

We ask now if we have not fairly shown that the authorities in support of the glittering generality involved in defendants in error "Point I" have no application to the case at bar

II.

Where the Land Department of the Government has issued a patent or certificate of patent to lands, no subsequent entryman or applicant, by his application, can acquire any vested right in, or vested right to, such land.

McMichael vs. Murphy, 197 U. S. 304.

This case decides what we have always conceded, viz: That a patent or entry, valid on its face segregates the tract of land from the public domain, and precludes another entry and the acquisition of any right.

But what has this to do with patents and certificates of entry and entries alleged to be null and void on their face as in the instant case?

In re Emblem, 161 U. S. 52.

Emblen vs. Lincoln Land Co., 184 U. S. 660.

These cases were analyzed in our original brief at pages 39, 40 and 41, and shown not to be in point but to be similar to **McMichael vs. Murphy.**

State Ex Rel Goodloe vs. Register, 47 An. 568.

Goodloe applied to the Register of the Land Office to buy certain State lands. He tendered the price. The Register refused the application upon the ground that the lands were no longer public lands, but belonged to the Pontchatrain Levee District under Act 95, 1890.

Goodloe brought mandamus proceedings.

Supreme Court held that the lands under Act 95 of 1890, vesting title in the Levee Board, had passed out of the State and held that the Register could not issue patents to lands thus transferred. His ministerial functions had ceased.

The Supreme Court said:

> "The Relator, it is true, has offered to become a purchaser and has made a tender of the price. **As the land were** not in the market, this could not have the effect of vesting him with title, whatever effect, as between the parties who desire to become purchasers of lands from the State, such a tender may have, the formality observed would have no effect against the Land Register, whose ministerial functions have been withdrawn by statute."

The Act 95 of 1890, was passed **prior** to the application of Goodloe for the lands and hence he had no standing to attack the constitutionality of the act.

In our case at bar, the lands are claimed by us to be State lands still, because of the absolute nullity of the patents and certificates of entry under which they were held, and Acts 85 and 86 of 1906, were passed **subsequent** to our application and tenders and we attack their constitutionality as impairing our vested rights.

The difference between the **Goodloe case** and our case is that of night and day.

IV.

The entry of public lands of the State or United States, **whether legal or illegal** (black-letter ours), segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled or removed.

Here, again, we have a glittering generality.

Let us see what the cases cited decide.

James vs. Germania Iron Co., 107 Fed. 603.

This was a contest between claimants holding the equitable title and claimants holding the legal title to land in dispute under a patent issued to Wm. Craig on Act 23, 1896. The land had been located with Sioux half-breed scrip. A contest arose between the locator of the scrip and one who applied to pre-empt the land. The contest had been heard, decided, appealed and finally reached the Secretary of the Interior for decision.

On February 18, 1889, the Secretary gave a decision directed to the Commission of the General Land Office

declaring the location of the scrip invalid, the pre-emption fraudulent and holding the lands open to disposal. The local land officers were informed of the decision on February 22, 1889, and on February 23, 1889, one Hartman applied to enter the land, which was allowed.

On February 19, 1889, however, after the Secretary's decision, but before it was communicated to the local land office, one James applied to make a homestead entry which was refused because the land was covered by the prior entry with Sioux scrip. A contest arose and on December 21, 1894 the Secretary of Interior held that James acquired the superior right.

The complainant urged that the finding was contrary to

> "an established rule, a settled practice, and a long line of decisions of the Land Department that no rights to enter or to secure the entry of land covered by a prior entry can be acquired by strangers to the litigation at the local land office before the decision of the invalidity of the prior entry is officially communicated to the local land officers and the prior entry is canceled on the books and plans in their office."

Sanborn, Circuit Judge, in deciding the case said:

> "Many questions have been argued and many decisions have been cited in the briefs of counsel which have little, if any, relevancy to this question, (whether the rule above referred to existed) and, before discussing it, some of these will be briefly mentioned and their immateriality noticed."

Unfortunately for us, this is the complaint we have to make against the brief of defendants in error; and this fact forces us unwillingly to write pages to show this irrelevancy.

Judge Sanborn finally said:

> "The review of the rules and decisions of the Land Deparment in which we have indulged conclusively demonstrates the facts that, on February 23, 1889, when Hartman filed his application, there was, and there had been for fourteen years prior to that time, a printed rule of the Department to the effect that after the reports of the Register and Receiver upon a contest over an entry had been forwarded to the Commissioner, those officers should take no further action affecting the disposel of the land until instructed by the Commissioner; that the practice of the Department had conformed to the rule; that there had been no decision of the Department, which, after consideration or discussion of the rule, had modified it or limited its effect; that the few opinions cited against it do not mention or refer to the rule, and are either devoted to the consideration of other questions or to a repetition of the **obiter dictum** in the **Reed case. In this state of the case, what was the true construction and legal effect of this rule on February 23, 1889?** Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than eroneous judgments. They could not have affected the rule. Their only effect would have been to have caused the issue of the patents to the particular tracts of land whose title was in question, in them, to the wrong party. **Nothing short of an express and formal repeal or abrogation**

> **of the rule, and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms.** (Revised Statutes, 453, 2478.) All the authorities were that this rule, and a practice in conformity with it, obtained during the pendency of a contest, and all that discussed the question were of opinion that it continued in force until the decision of the Secretary or Commissioner was officially communicated to the local land officers." (Black-letter ours.)

The Court below had found that under the rule and practice stated the land remained **withdrawn** from acquisition at the local office until the decision of the Secretary that the prior entry was void was officially made known to the local officers and until notation of cancellation was made in the plats and records.

This finding was sustained.

Thus were the lands segregated by operation of the rule in force in the Land Office.

We, therefore, see that this decision was based entirely upon a rule of long standing in the Land Department of the United States.

The rule had its origin, as Judge Sanborn shows, in the desire to protect the citizens of the vicinage who might be 1000 miles from the Secretary's office against a preference which could be acquired by a sentinel stationed in the Secretary's office at Washington.

This case and the class of cases to which it belongs have no application to the case at bar.

There is no such necessity for such a rule in the Land Department of Louisiana and **no such rule exists.**

Kansas Pacific Ry. Co. vs. Durmeyer, 113 U. S. 629.

This involves another class of cases that have no application to the facts of the case at bar. They involve the construction of a particular act of Congress, being a grant to a railroad.

Mr. Justice Miller delivered the opinion of the Court.

The case involved the interpretation of the Act of Congress of 1862, 12 Stat. at L. 489.

Section 3 of Act 1862, making the grant to the Railroad of every alternate section, designated by odd numbers * * * not sold, reserved * * and to which a preemption or homestead claim may not have **attached** at the time the line of said road is definitely fixed.

The Court found in that case that the

> "claim was made and filed in the land office, and there recognized, before the line of the Company's road was located. The claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the Act of Congress, this homestead claim had **attached** to the land, and it, therefore, did not pass by the grant."

Justice Miller continuing said:

> "Of all the words in the English language, this word **attached** was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant

> a proceeding in the proper land-office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was expected out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

Sioux City Co. vs. Frifeey, 143 U. S. 32.

This case was similar to the Kansas City case just analyzed, **113 U. S. 629,** and involves construction of a particular railroad grant and what the word "attached" meant.

Whitney vs. Taylor, 158 U. S. 85.

This was again a case involving a pre-emption claim. Mr. Justice Brewer was the organ of the Court. The case turned upon the question whether at a certain date when the railroad filed its map of definite location.

> "the tract in controversy was public land of the United States and therefore passing under the grant to the Company, or was excepted therefrom by reason of the previous declaratory statement of Jones."

Justice Brewer refers to **Kansas Pacific R. Co. vs. Dunmyer, 113 U. S., 629,** involving the abandoned homestead claim of one Miller and quoted the language of the Court interpreting the word "attached" in the Act of Congress.

The mere initation of an inchoate right by the homesteader or pre-emptor was sufficient to cause his claim to

"attach" to the land, which excepted it from the grant because the grant covered only land "to which a pre-emption or homestead claim may not have attached."

Justice Brewer further called attention to the fact that "the granting clause of the Pacific Railroad Acts" differs "from similar clauses in other railroad grants" and "excepts lands to which pre-emption of homestead 'claims' have been attached, instead of simply cases of pre-emption or homestead rights."

Justice Brewer also says:

> "In this respect notice may also be taken of the rule prevailing in the land department where the filing of a declaratory statement is recognized as the assertion of a pre-emption claim which excepts a tract from the scope of a railroad grant like this." Citing authorities.

North Pacific R. R. vs. Sanders, 166 U. S. 620:

Construction of Pacific Railroad grant as to excepting mineral lands.

Justice Harlan said, that:

> "It appears from the above statement of the case: That lands were expressly excepted from the grant made for the benefit of the Northern Pacific Railroad that were not free from pre-emption 'or other claims or right' at the time the line of the railroad definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

And the Court held that the applications to purchase these lands, made in the form prescribed by the Acts of

Congress constituted "claims" within the meaning of the third section of Act of 1864, making the railroad grant.

North Pacific R. R. vs. DeLacey, 174 U. S. 622:

This case is cited by counsel in error.

This was a case where the claimants lost their rights of pre-emption by operation of law because they allowed the thirty months after the date prescribed for filing their declaratory notices to elapse without making proper proof and payment for the lands claimed.

They were on the face of the record no longer an "existing" claim.

The Court said:

> "A claim is not an existing one where by the record it appears that the right to make proof and payment has expired under the terms of the statute."

And the Court held it was unnecessary to enter a cancellation on the record of the office in order to permit a law of Congress to have its legal effect; and, therefore, held that the lands was not excepted from the grant.

Thus we see, by a careful and full examination of every authority cited by defendants in error in their "Syllabus" 3, that the statement that an entry of public lands of the United States, whether legal or illegal segregates it from the public domain, had only been made (1), in those cases where a rule of the Land Department, to avoid the advantage to be gained by unscrupulous per-

sons from the fact that the office of Secretary of Interior was at Washington perhaps one thousand or two thousand miles removed from the local land office, **required** that a **physical cancellation of the entry** on the books of the local office after formal notice of the decision of the Secretary of the Interior, before another application, or entry would be received; and (2), in interpreting in the Pacific Railroad Land grant Acts the section referring to pre-emption or homestead claims which had "attached" to the land or declaring that and in holding that all lands to which such claims, whether valid or invalid, had attached were **excepted** from the grant.

It has taken time and given us much labor to show that these decisions have no application to the case at bar.

What is the case at bar?

Act 75 of 1880, was the Act in force when the assignees of John McEnery **located** with the absolutely null and void scrip or certificates (null and void on their face because "made locatable upon any vacant lands of the State" in defiance to Act 23 of 1880), lands **not recovered by John McEnery.**

Act 75 of 1880 is found in the appendix of our original brief, page 54. Section 5 of that Act made it a felony for the Register of the Land Office to receive **anything** but money, **cash**, for the sale of public lands, and made it a felony for him to make an **entry** on his books until he had the receipt of the State Treasurer, showing the cash had been actually paid the State.

Every acre of the 83,000 acres involved in this suit was located, "entered" with this illegal McEnery scrip in violation of the Statute above.

Section 10, fixes the price to be paid at 75 cents an acre.

An entry made with illegal scrip or any kind of scrip when the statute made it a crime to record the entry except for cash is a nullity on its face.

Counsel complains we do not allege as a fact that the "entries" were null and void on their face.

Counsel overlook the fact that such an allegation would not be an "allegation of fact" but "a conclusion of law."

We allege the certificates were null and void on their face (which is a conclusion of law) because they were "made locatable upon any vacant lands of the State" (which is a statement of fact). And we allege that **these certificates** were issued and made thus locatable in conformity with the illegal contract made with John McEnery, and in violation of the express prohibition contained in the **proviso** of Act 23 of 1880.

That is why it results as a conclusion of law to be decreed by the Court that these **entries** were absolutely null and void on their face.

The Supreme Court of Louisiana in this case (Tr., p. 85), has recognized that Acts 85 and 86 of 1906, have repudiated payments made with these certificates for patents or certificates of entry.

This brings us to Point 4 of Syllabus, which fortunately contains a palpable inaccuracy.

We will first dismiss points 5 and 6 from our consideration and then discuss point 4, and generally the case.

Point 5 claims this is a moot case—because we have no interest.

In the first place, we are now considering the final judgment and opinion of the Supreme Court of Louisiana, not random arguments of intervenors.

The Supreme Court did not decide this was a moot case, and hence we are not called upon to combat extraneous matters.

The point necessarily "begs the question." If we had a vested right, we have a real interest.

The point is have we a vested right. If we have then Acts 85 and 86 of 1906 impair that right and hence are violative of the Federal Constitution.

Hence, we have a clear-cut Federal question before the Court, and to ascertain whether we have a vested right, it must first be determined whether the certificates, entries, certificates of entry and patents attacked are absolutely null and void on their face.

The relief we ask is to decree Acts 85 and 86 of 1906 unconstitutional and void as to us, which will prevent the carrying out of their provisions to our detriment.

To say we have no actual interest is to say we have no vested right—which is really "begging the question" and the very point at issue.

Point, 6, we are advised, is not "concurred" in by the Attorney-General who signs the brief.

The brief cays "This point by intervenors."

As the point is not made by the "defendants in error" we feel we are excused from answering it.

We have now examined every decision cited in the Syllabis of "defendants in error." It is to be assumed that they put their strongest cases in their syllabus.

We submit, with confidence, that our analysis has been searching and exact and that while the statement of general propositions given by the defendants were made by the Courts, they were made in cases that bear no analogy to the case at bar, were in reference to facts totally different, and in Points 2 and 3, were uniformly the result of the interpretation and the giving effect to establish rules in the United States Land Office, with which this case has nothing to do, or the construction of special railroad grant Acts.

Summarizing the defendants' claims, we assert with positiveness.

(1). That this Court has never decided that an entry, or certificate of entry, or patent, null or void on their face, which showed on their face either the want of authority of the officer to issue them, or that the lands designated had been withdrawn, segregated the lands from the public domain.

The decisions cited by us in our original brief, pages 42 to 47, attest the contrary.

We do not contend that an entry, certificate of entry or patent *prima facie* valid does not segregate the lands.

Such are the cases cited by defendants in error at page 15 of their brief, and cases like **Carroll vs. Safford, 3 How. 460,** involved no question of invalidity of certificate but merely the question whether, when land has been purchased from the United States and **paid** for and a final certificate given, is it taxable property—before the issuance of a patent.

The Court decided it was taxable.

The entries, certificates of entry and patents in the instant case are not only not **prima facie** valid but absolute nullities.

We have demonstrated, we hold, beyond cavil, that the authorities cited by defendants in error have absolutely no application to the case at bar.

We now take the argumentative part of their brief and regret to see so much unintentional mis-statement of facts and the case, that requires time, labor and expense to set straight, with added danger of making our brief tedious to this Court.

At page 9 of brief, they state that our allegation quoted on page 8 to-wit:

> "That these certificates (scrip) were assigned by the said John McEnery, **whose assignees located them** upon the public lands hereinafter described," etc., means (quoting "that some of the purchasers of the scrip located it."

Why are we called upon to answer such **argument**.

When we say that the assignees of John McEnery located their scrip, we mean **all** the assignees, not **some**. If we had meant **some** we would have said so.

The quotation from our petition, at page 8, reads:

> "for which patents thereafter illegally and fraudulently issued to some of said assignees, while others stood upon their certificates (scrip)."

A quotation should not contain interpolated words, without explanation. We did not use the word (scrip) which is gratuitously supplied by defendants.

Counsel then say that we mean (quoting) "while others stood upon their scrip—i. e., made no attempt to locate their scrip at all."

How can counsel make such an argument. We have just stated that **all** the assignees **located their certificates while** only **some received** patents.

We averred that the assignees of John McEnery located their scrip.

What right have counsel to say that we said **some** assignees did not locate their scrip.

The allegation is **all assignees located** their scrip, while **some** assignees got patents and other assignees stood upon their certificates.

The attempt to justify the statement of the Supreme Court that throughout the petition the word "certificate" is used as synonymous with "scrip" leads to a reductio ad absurdum.

The scrip or certificates simply entitled John McEnery and assignees to a designated number of acres of land, 40, 60 or 120, or more.

No land is described in such certificates or scrip.

When scrip or certificates are **located**, particular lands are **selected.**

How could a person stand on his **unlocated scrip?**

How could scrip or certificates which merely entitled the holder to 40 or 60 acres of land—be a title or claim to any particular lands.

The counsel then say (quoting page 9):

> "There are then two classes of people **according to the petition** (black-letter ours). Those holding patents to the land and those holding the McEnery scrip **which had not been located on any land.**"

This statement and argument are so unfair and misleading we offer our apologies to the Court for being compelled to consider it.

Fortunately, the defendants in error cannot dispose of our case by mis-statements.

Where a petition is being construed, and the language is direct, positive and unambiguous but a word is used in palpably two senses, the Court will adopt the construction which will make sense—not a forced construction that makes nonsense.

We averred that the Register issued to John McEnery a large number of certificates: that these **certificates were assigned** (this means **all the certificates that were issued were assigned** because we did not qualify the statement) that his assignees **located** these certificates (which means that **all of his assignees**, because again we did not qualify

the statement); that patents were thereafter issued to **some** assignees (this means that **all** did not get patents, but only **some**); and that others (assignees) stood upon their certificates (not scrip). The scrip or certificates **had been located.** They stood upon their **located certificates or certificates of location, or entry.**

If the scrip or certificates **had not been located,** they would not have called for any lands much less the lands described in the petition, as averred.

We use the word certificate, meaning scrip, in the first part of our allegation because the contract with John McEnery (Tr., p. 2) used it, but after we averred that these certificates had been **located,** and said some assignees stood on their certificates, we could not have ment unlocated scrip, but **located** scrip or certificates, certificates of location or entry.

If anything further were needed to show that our petition referred to or covered lands held only under certificates of entry, a reference to the prayer of the petition (Tr., p. 16) would settle the matter. Our prayer was to prohibit the Register of the Land Office from receiving payments from the "holders or owners of patents or **certificates purporting to convey** or to cover any of the lands described in the petition." A certificate which "conveys" particular lands described in the petition could not possibly be a piece of mere scrip as contended for by counsel.

Counsel for defendants in error build up an argument upon the distorted allegations of our petition and then

triumphantly declare that when the Supreme Court of Louisiana holds that a piece of scrip is not a certificate on entry—this is the construction of a local statute, a construction of a local land law; a rule of property.

What momentous effect is given to the declaration of a simple truth, not local, but as broad as our Continent.

Pray, what local statute is construed to arrive at this dictum? We are not informed.

Our original brief has covered this point. The lands involved are held (1) under patents and (2) under certificates of entry or location.

The Supreme Court of Louisiana quotes this Court as declaring that a patent (without qualification, hence a patent null and void on its face) once issued, segregates the lands from the public domain. The cases cited in support of the principle do **not** sustain it.

If this Court holds to the same effect, we have no cause of action as to the patented lands. But our petition covers also the lands that are held only under certificates of entry.

The Supreme Court of Louisiana in its opinion reached the conclusion, upon clearly a garbled or inaccurate quotation (which we have shown in deadly parallel in original brief, page 27) that we only applied to enter the lands held under patents, and not under certificates of entry.

They then decided that the Legislative Act 86 of 1906, had declared these certificates invalid on their face.

Therefore, if our petition covered applications for these lands held under certificates of location or entry, which the Legislature and the Supreme Court of Louisiana have held void, we have a vested right, as manifestly the lands never having been patented were still public lands.

This Court, therefore, will not consider the opinion of the Supreme Court given on the inaccurate and insufficient quotation of our petition, nor the argument of counsel above set forth upon their own distortion of our allegations, but will decide for itself **what lands we applied for and tendered the purchase price.**

We have already referred to **Pennoyer vs. McConnaughy, 140 U. S. (35 L. Ed.), 365.**

It is true we have not paid our money to the State, but we made a formal legal tender which has the same legal effect as payment.

This is so because the action or non-action of the officer could not make or unmake a vested right.

As said in **State Ex Rel, Goodloe, 47 An., 568,** the officer could not be compelled to accept our application. whatever effect as between the parties, the intending purchasers and the State, their applications and tenders might have.

This Court in **Frisbie vs. Whitney, 9 Wall. 187 (19 L. Ed., 669),** while holding that mere settlement on public lands gives no right against the government, commented on what Frisbie had failed to do, and said that he had gone upon the land, enclosed some, and built a house;

had applied to the Register and offered to make a declaration under the right of pre-emption. "That is all. He had paid no money, nor had he then **tendered any.**"

Counsel holds that we failed to claim plaintiffs in error are the first entrymen. We make no such claim, as a matter of course.

These certificates we allege, were "located by the assignees of John McEnery," entered; hence an entry was made.

They are in error when they say "They nowhere allege any informality or illegality in said entry."

The allegation (Tr., p. 4) is that the issuance of the scrip (which we elsewhere declare [Tr., p. 3] was made locatable upon any vacant lands of the State) was **ultra vires,** "and that said certificates conferred no right upon John McEnery or his assignees in and to the **lands located therewith,** i. e., entered therewith.

Again we aver (Tr., p. 13):

> "Petitioners aver that in every case, the lands herein described were entered with illegal McEnery scrip or certificates, heretofore set out," etc.

An entry made with a certificate void on its face, and against the law necessarily is void.

We have heretofore pointed out that the allegation that the entry was null and void would be a mere conclusion of the law.

We stated the facts. The Court will decree the nullity of the entry.

And the Supreme Court of Louisiana has recognized that Acts 85 and 86 of 1906, repudiated payments for certificates or entry—hence entries—with this null and void scrip (Tr., p. 85).

The petition proceeds upon the theory that no rights were acquired by the assignees of John McEnery in the lands entered with these null and void certificates.

This is so for Section 5 of Act 75 of 1880, the law in force at date of entry, prohibited an entry from being made except for **cash** and only after the **money** had been deposited in the State Treasury, and made it a **felony** for the Register of the Land Office to make an entry on his books otherwise.

This brings us to the final arguments of defendants in **error.**

They claim we have not averred that the patents are void on their face.

They state:

> "We might preface these quotations by saying that for the purposes of the present hearing, plaintiffs' allegations of fact are taken as true, but his allegations and conclusions of law and legal results of these facts are open to dispute, **8 La. An., 145; 124** etc."

We accept this proposition as correct, but by reason of the fact it is sound, defendants inconsistency is shown out of their own mouth.

Is it not certain that the **mere allegation** that an entry, scrip or certificate, patent or certificate of entry is null and void on its face is only a "conclusion of law."

If a petition did not show the **facts** which made such an entry, certificate or patent void would the allegation that they were void on their face amount to anything?

We say certainly not.

Hence, what matters it, if the petition alleges the **facts and circumstances** (which are taken for true) which make the entries, certificate and patents null and void on their face, whether we allege the conclusion of law to-wit: that such entries, certificates and patents are null and void **"on their face."** What matters it whether we supply the words "on their face?"

We have alleged them all absolutely null and void under the facts and circumstances stated or set forth

To have added the words "on their face" would not have made them so if, as a matter of law, they were not null and void on their face.

We have, however, made the distinct but unnecessary allegation demanded by defendants.

Defendants conclude this part of their brief by referring to **McEnery vs. Nichols, 42 An. 209.**

They state:

> "In that case apparently McEnery came before the Court with some of this scrip (not here alleged void on its face) and asked a mandamus to compel the Governor and Register to deliver patents to him, and this Court not only failed to note that the scrip was void on its face, but they made the mandamus peremptory and ordered the patents to issue. And what we seriously ask this Court to consider is:

"How did it happen, If these certificates be void on their face, and patently invalid, that five Justices of the Supreme Court of Louisiana not only failed to notice such invalidity, but ordered patents to issue?"

This is not only misleading but unfair—unfair because it is grossly erroneous. The same argument was made before the State Supreme Court, by counsel for an intervenor and the present brief copies the foregoing statement from their original brief.

We took occasion to go to the original record of case of **McEnery vs. Nicholls, 42 An. 209.**

This original record shows that no **scrip** was before the Court. The petition of John McEnery sets forth that certain lands (not here in contest) were recovered by him and were **partitioned** between the State and himself and that (quoting from the petition) "the following described internal improvement lands fell to relator" (John McEnery); that he demanded patents, which were refused him and he brings this mandamus suit to compel their issuance.

Therefore, when counsel for intervenors in a brief on behalf of the Attorney-General representing the real defendants in error, adopt the language and argument verbatim made by them before the State Supreme Court, after we have shown them their error of fact, we say it is unfair and misleading to this Court.

In **McEnery vs. Nicholls, 42 An. 209,** there was not a **piece of scrip before the Court.**

That is why five Judges did not notice their invalidity on their face.

In that case John McEnery asked for lands he had **actually recovered** and which had been aprtitioned and **alloted** to him.

We now come to the final argument of defendants, to-wit: that in deciding this case, the Supreme Court of Louisiana bases its decision upon its interpretation of a statute of the State, which is binding on this.

If the brief of counsel for defendants in eror had not been so full of glaring inaccuracies and misleading statements in argument, we might have some fear for our salvation on this point.

In our opinion, the Supreme Court of Louisiana has not predicated or put its decision on the construction of any statute of the State.

Let us see what the defendants in error claim.

They say (page 47 of brief):

> "Applying this doctrine to the case at bar **this Court would say:**
>
> "The local Supreme Court has held on a matter of local land law that the two acts of 1880 were not so violated as to make the patents issued thereunder void on their face, and the land was therefore segregated from the public domain. Taking this construction as a fact, and finding that at the time of Frellsen's entry the land was segregated from the public domain, we are asked to discover whether by his entry Frellsen acquired any veted right, and if he acquired such a vested right, whether the State's

> action in permitting the entryman whose entry had segregated the land to perfect that entry was a deprivation of Frellsen's vested right in violation of the Constitution of the United States." (Black-letters ours).

This is language that they would put into the mouth of this Court.

It will be noticed that the statement refers to "two acts of 1880."

Evidently, counsel mean Act 75 of 1880 and Act 23 of 1880.

The Supreme Court made not the slightest reference to Act 75 of 1880, in any part of either its original opinion (Tr., pp. 82 to 85) or opinion on rehearing (Tr., pp. 88 and 89).

Further, it did not consider the question of nullity of an entry made in violation of Sec. 5 of Act 75 of 1880.

The Supreme Court never held or referred to the entries made as having segregated the lands from the public domain.

Its decision was predicted solely and purely upon the doctrine that (quoting):

> "A patent under the great seal of the State vests the legal title in the patentee segregates the land from the public domain, and deprives the Land Department of jurisdiction. Hence a subsequent application to enter the same land confers no inceptive rights on the applicant. A patent cannot be revoked or set aside except upon judicial proceedings instituted on behalf of the Sovereign."

Citing authorities **161 U. S. 52; 184 U. S. 660,** etc., which we have analyzed and upon which we have commented. (Original opinion, Tr., p. 85). Everything else they say is merely argumentative.

This is shown by opinion on rehearing (Tr., p. 89), in which they state (quoting):

> "But the gist of our decision is that patents having **issued** the lands were thereby segregated from the public domain, and were no longer subject to entry. There is no authority or precedent that would warrant this Court to decree such patents to be null and void in a collateral proceeding to which the present holders of the patents are not parties."

Considering the fact that counsel for intervenors, present holders of a great many of the patents, have argued this case from its inception, orally and by brief and even now apparently write the brief in this Court, it is difficult to understand why they are not parties.

The decision of the Supreme Court is, therefore, not based on any statute, but upon the erroneous assertion of a principle confined only to patents *prima facie* valid.

When the Supreme Court of Louisiana, after referring to other matters argumentatively, says: "But the gist of our opinion is," we take it that the Court meant, "but we base our decision on" (the following ground, etc.

It is true that the Supreme Court, in its original opinion, referring to **McEnery vs. Nicholls, 42 An. 222,** said:

(Quoting): "In **State ex rel John McEnery vs. Governor, 42 La. An., 209,** it was held to be the duty of the

> Register to issue patents to the relator for his interest in all lands, warrants or scrip, recovered by him. While the question of the legality of the stipulation in the contract as to the issuing of scrip 'locatable on any public land' was not involved or discussed in that case, the duty of the Register to issue scrip under Act 23 of 1880, when lands were recovered in kind was announced. Ib. 222. Hence, the fact that the patents in question refer to Act 23 of 1880, or to certificates issuable under same, do not affect their validity."

It is equally true that the Court in **42 An. 222**, did make this declaration, but it was so patently an error of fact, that we cautioned the present Supreme Court against falling into the same error. Our admonition was in vain. They fell into the same error and used the language just above quoted.

We then, by an application for a rehearing, pointedly called the Court's attention to the perpetuation by it of an inexcusable error, and the Supreme Court, in its opinion, on our application for a rehearing (Tr., pp. 88 and 89) withdrew the language used in its original opinion, and corrected a mistake which had occurred by the Court's confusing the Act of the Legislature with the illegal part of the contract made with John McEnery.

As shown in the original opinion, the Court was under the impression that scrip or certificates were issuable under Act 23 of 1880.

Hence, on our application for a rehearing they corrected this improper finding by admitting that "Act 23 of 1880 does not, in terms, authorize the issue of scrip or certificates."

(See Opinion on Rehearing, Tr., p. 88.)

Of course it did not.

Why, it is asked? Because it provided that John McEnery should get part of the lands he recovered.

Hence, there was no necessity for any scrip. He became owner in indivision with the State of Louisiana of every tract of land he recovered.

The Court said, correcting their error:

> "In our opinion we referred to the case cited for the purpose of showing that *under the contract* (our italics) scrip and patents might have lawfully issued to John McEnery for his interest in lands actually recovered by him for the State of Louisiana."

So the Court withdraws its erroneous statement that scrip or certificates could have lawfully issued under Act 23 of 1880, and says it meant to say scrip could have lawfully issued "under the contract made pursuant to Act 23 of 1880," and patents might have issued for his interest in lands "actually recovered by him."

Why, of course. Nobody ever disputed that proposition.

The Court says that the mere reference to Act 23 of 1880 in a patent does not show its invalidity. That is all the Court says, on rehearing and final opinion.

But that is not all of our case.

We have also alleged that all of these patents refer on their face either to Act 23 of 1880, or to the certificate number, which certificate was absolutely null and void. (Tr., p. 13.)

And we had, theretofore, alleged that all the lands described in the petition had never been recovered by John McEnery. (Tr., p. 3.) And that these certificates were "made locatable upon any vacant lands granted to the State."

The Supreme Court of Louisiana has, therefore, restricted its decision to deciding that a patent segregates the land; and, while it refers *arguendo*, to the reference on the face of the patents to Act 23 of 1880, and says this mere reference does not make the patent null, yet it fails to pass upon the legal effect of the McEnery certificate number given on the face of the patent.

Now, we say that the Supreme Court of Louisiana advisedly failed to consider this point in our petition. Why, it is asked?

Because Act 85 of 1906 had declared the invalidity of patents

> "purporting, on their face, to have been paid for by certificates or warrants of **given numbers**, and where the certificates or warrants so referred to as having been given in payment for the patents, are, in fact, certificates or warrants for scrip, which scrip, for

any reason, was not legally receivable in payment for such patents."

(Act 85 of 1906, copied at page 35 of original brief.)

And because, further, the Supreme Court had held (Tr., p. 85) that these McEnery certificates "locatable on any public land," had been declared invalid by Acts 85 and 86 of 1906, and had been repudiated.

The argument is unanswerable therefore, that the Supreme Court did not pass upon the question of the legal effect of a reference on the face of the patents to McEnery certificate numbers, as being purchased therewith, because the Legislature having declared these patents **invalid on their face by reason of such reference,** the Supreme Court would have been compelled to have held accordingly.

They, therefore, preferred to rest their decision upon their statement of general law, to-wit: That a patent, valid or void on its face, segregates the lands.

They quote this Court for their authority.

That this Court has never so decided is too clear for argument.

Our allegation is that every patent refers on its face to **McEnery certificate number.**

Of course, your decision would only apply to such patents. On the trial on the merits a patent which did not, on its face, so refer to a McEnery certificate number would not be affected.

The Legislature of Louisiana having declared these patents **invalid on their face,** and the Louisiana Supreme

Court having put its decision on a general principle of law as broad as the continent, there is nothing in our respectful opinion for this Court to do but to reverse the decree of the Supreme Court of Louisiana.

This is, however, but one-half of our case.

We are claiming that all of the certificates did not go to patents, but that all of the assignees of John McEnery located or entered their certificates illegally made "locatable upon any vacant land," but **some** of them did not get patents, but stood on their **located certificates**, or certificates of entry.

The Supreme Court of Louisiana, as well as the acts of the Legislature (Nos. 85 and 86 of 1906) declared the invalidity of scrip "locatable on any public land," and repudiate payments made therewith. (Tr., p. 85).

As the absolute nullity of these certificates of location or entry is recognized, there is nothing for this Court to do but to hold that we have a cause of action and a vested right to purchase these lands, if our petition embraces lands not patented but held under located certificates or certificates of entry.

This whole case comes upon the allegations of our petition.

If the lands described in our petition and alleged to be held under located certificates or certificates of location or entry, null and void on their face, did not segregate the lands from the public domain, or, if the patents admitted by the Legislature and the Supreme Court to be invalid upon their face, did not segregate the lands—

then the lands were public lands, and, when we accepted the invitation of the State of Louisiana to purchase its public lands and tendered the purchase price to the proper officers, we acquired a vested right which could not be impaired by Acts 85 and 86 of 1906, passed subsequent to our applications and tenders, and which authorized third persons to validate their title by paying $1.50 in the State Treasury, thus ignoring our applications and tenders.

The Supreme Court of Louisiana cannot give effect to Acts 85 and 86 of 1906, and impair our vested rights by stating erroneously that this Court has decided that a patent void or valid on its face segregates the lands from the public domain, and we acquire no rights by our applications and tenders. But even if this Court should which we cannot believe possible, sustain such a doctrine, this Court must find that our petition included or covered lands held under certificates of location, and as the Supreme Court of Louisiana declares that Acts 85 and 86 of 1906, recognized the nullity of certificates of location purchased with McEnery scrip "locatable on any vacant land," and this is our case this Court must in every event hold we have a cause of action at least for these lands.

The judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted,

H. G. MORGAN,

P. M. MILNER,

Attorneys for Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1909.

No. 129.

J. W. FRELLSEN AND COMPANY
A Partnership Composed of Joseph W. Frellsen and James D. Hill,
Plaintiffs in Error,

VERSUS

A. W. CRANDALL ET AL.
Register of the State Land Office, Et Al.

SYLLABUS.

1. A patent to lands, issued by the Land Department of the Government, is, until annulled by judicial tribunal, conclusive against the government, and all claiming under junior patents or titles, and,

"Only the Government, under sanction of the proper authority, can institute proceedings to annul or rescind the patents. And such proceedings must be before judicial tribunals with citation to patentees and assigns.

United States vs. Throcknorton, 98 U. S. 70; McLaughlin vs. United States, 107 U. S. 526; Western Railroad Co. vs U. S., 108 U. S. 510; United States vs. San Jacinto Co., 125 U. S. 273; United States vs. Stone, 2 Wall. 535; Mowry vs. Whitney, 14 Wall. 439; Smelting Co. vs. Kemp, 104 U. S. 647; Emblen vs. Lincoln Land Co., 184 U. S. 660.

2. Where the Land Department of the Government has issued a patent or certificate of patent to lands, no subsequent entryman or applicant, by his application, can acquire any vested interest in, or vested right to, such land.

After a patent has once issued, the original contest is no longer within the jurisdiction of the Land Department.

McMichael vs. Murphy, 197 U. S. 304; In re Emblen, 161 U. S. 52; Emblen vs. Lincoln Land Co., 184 U. S. 660; Sate ex rel. Goodloe, 47 An. 569; and many other cases cited in the brief.

3. The entry of public lands of the State or United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled or removed.

James vs. Germania Iron Co., 107 Fed. 603; Stimson vs. Rawson, 62 Fed. 426; Words and Phrases, 8, 7308; Kansas Pacific Ry. Co. vs. Dunmeyer, 113 U. S. 629; Sioux City Co. vs. Griffey, 143 U. S. 32; Whitney vs. Taylor, 158 U. S. 85; North. Pac. R. R. vs. Sanders, 166 U. S. 620; North. Pac. R. R vs. DeLally, 174 U. S. 622; and cases cited in brief.

4. Where a plaintiff alleges that patents to public land issued by the State are void because issued contrary to provisions of Act 75 of 1880 of the State, and paid for in certificates issued contrary to Act 23 of 1880 of the State, and where the State Supreme Court, construing these statutes, holds that the certificates might have been properly issued under Act 23 of 1880, and holds that the patents might properly have issued under Act 75 of 1880, and, hence, such an allegation is not an allegation that these patents are void on their face, the Supreme Court of the United States will be bound by that finding of the State Supreme Court; it being (a) a rule of property; (b) a decision regarding alienation of a state's own public land; (c) a construction by a State Court of two State statutes.

(Authorities in body of brief.)

5. An action can only be brought by one having a real and actual interest **which he pursues.**

Inasmuch as the plaintiffs in this case ask for no relief or benefit for themselves, the case is a moot case.

Code of Practice of Louisiana, Art. 15; Moore vs. New Orleans, 32 An. 727; New Orleans Gas Light Co. vs. Hart; 40 La. An. 474; Louis vs. Saving Institution, 33 An. 1463.

6. Inasmuch as the scrip surrendered to the State of Louisiana when the lands in question were entered, undoubtedly had a value, the titles to these lands cannot be annulled without restoring to the owners, the value with which they parted.

(This point by intervenors.)

If the Court Please:

The plaintiffs in this case filed in the District Court for the Parish of East Baton Rouge, State of Louisiana, a petition seeking an injunction against A. W. Crandell, Register of the State Land Office, and Paul Capdevielle, Auditor of the State of Louisiana, and James M. Smith, Treasurer of the State of Louisiana, enjoining them from receiving $1.50 per acre from certain entrymen which these entrymen were alleged to be about to tender in order to perfect their titles to certain lands which had belonged to the State. The facts alleged in the petition are thus summarized by the Supreme Court of Louisiana, on page 83 of the present transcript:

> "The lands described in the petition were acquired by the State of Louisiana under the Swamp Land Grants of 1849 and 1850. In the year 1880 the Legislature (of Louisiana) passed Act No. 23, authorizing the Governor to institute proceedings and to employ counsel to recover for the State lands donated by the several acts of Congress for divers purposes, and the value of such lands in money or government scrip which might have been illegally disposed of by the United States. The act provided 'that the State shall incur no cost or expense in the prosecution of said claims other than an allowance to be made by the Governor out of the lands, money or scrip that may be recovered.'
>
> "In March, 1880, the Governor of the State entered into a contract with John McEnery, an attorney-at-law, to recover the lands, money and scrip referred to in Act 23 of 1880, and agreed to pay him for his services 'fifty per centum of the land, money or scrip

recovered, to be paid as provided in said Act No. 23.' It was further stipulated that 'where lands in kind are recovered the compensation as aforesaid of the said John McEnery shall be represented in scrip or certificates, to be issued by the Register of Land Office of the State, locatable upon any lands owned by the State.'

"The Legislature, by Act 106 of 1888, repealed Act 23 of 1880, and abrogated the said contract between the Governor and John McEnery (said abrogation to take effect January 1, 1889).

"John McEnery, prior to January 1, 1889, had recovered for the State many thousand acres of land, for which scrip or certificates locatable upon any lands owned by the State was issued to him. These certificates were sold and assigned by John McEnery and some of his assignees located their certificates on the lands described in the petition 'which have not been recovered by the said John McEnery under the contract entered into by and between him and the then Governor of the State, for which patents were thereafter issued.' The other assignees (to quote the language of the petition) 'stood upon their certificates.' It was argued at the bar that some of the lands described in the petition were not covered by patents but by certificates of entry. We have already quoted the allegation that patents issued for such lands. This fact appears also from the following allegations of the petition—to wit:

" 'Petitioners aver that in every case the lands herein described were entered with illegal McEnery scrip or certificates, heretofore set out, and the patents that were issued therefor refer upon their face to Act 23 of 1880, or to the certificate number, which certificate showed upon its face it was issued under Act 23 of 1880.'

"The word **certificate** is used throughout the petition as synonymous with **scrip**, and we cannot understand how a mere warrant locatable on any public land can be considered as the equivalent of a certificate of entry or receiver's receipt showing that the applicant has paid for a particular tract of land, and is entitled to a patent therefor. Hence, this case must be considered and determined on the assumption that patents issued to the assignees of John McEnery for all the lands described in the petition.

"In March, 1905, plaintiff made application for the entry of all the lands described in their petition under the provisions of Act 125 of 1902, and made a legal tender of the statutory price to the proper officials. **This application was refused by the Register for the reason that said lands had been previously entered and patented.** Plaintiffs took no legal proceedings against the Register to compel him to accept the price and to issue the proper certificate of entry.

"In the year 1906 the Legislature passed Acts 85 and 86, the former referring to patents and the latter to certificates of entry paid for in certificates or warrants for scrip, 'which were not legally receivable in payment, for the price of public lands. In both cases the Legislature provided for the confirmation of such patents and certificates of entry to the present holders and owners thereof, on payment in cash of the price of $1.50 per acre within one year from the date of the passage of said acts. The present suit was filed on July 12, 1906, a few days after the passage of Acts 85 and 86 of 1906. The sole defendants are the Register of the State Land Office, the State auditor and the State Treasurer. The relief prayed for is a decree perpetually enjoining the defendants from executing the provisions of Acts 85

and 86 of 1906, and declaring said acts to be unconstitutional, null and void."

The grounds alleged for the unconstitutionality of the Acts of 1906 are that plaintiff, by his application to enter, made March 28, 1905, acquired a vested right to the land, which vested right the State was divesting by permitting the holder of the alleged illegal patent to perfect his title.

To this suit there intervened various parties alleging that they had purchased the lands mentioned in the plaintiff's petition in good faith, for value, on the faith of the public record and outstanding patent from the patentees that they had been living on, cultivating and paying taxes on same for some twenty to twenty-five years, and that their patents and rights should not be disturbed. The original plaintiffs objected to these interventions. Thereafter (to quote from plaintiff's petition for a writ of error, page 91), an exception of no cause of action or general demurrer was filed by the Attorney General on behalf of the defendants, and the case went to trial upon the petition of the plaintiff and the exception of no cause of action or general demurrer.

The case was argued at length in the lower court. The District Judge found that the petition disclosed no cause of action and dismissed same. Plaintiffs appealed to the Supreme Court of the State, where, after argument, that tribunal also found that the petition disclosed no cause

of action, affirmed the decision of the Judge **a quo**, and dismissed the suit. From this judgment of the Supreme Court of Louisiana original plaintiff has sued out this writ of error.

FACTS IN DISPUTE.

The plaintiff takes issue with the Supreme Court of Louisiana which, as above quoted, found that plaintiff had alleged in his petition that patents had issued prior to his application for all of the land described in his petition. The following extracts from plaintiff's petition (page 3 **et seq.** of this transcript) show his allegations in this regard:

Page 3. Petitioner avers:

> "That the Register of the State Land Office, acting under the provisions of this illegal and void contract * * * issued to said John McEnery a large number of the **certificates** (i. e., scrip), the issuance of which was provided for only in and by said illegal clause contained in said contract covering in the aggregate a vast acreage, to the State by acts of Congress. * * * That these certificates (scrip) were made locatable only upon any vacant land granted to the State by acts of Congress. * * * That these certificates (scrip) were assigned by the said John McEnery, whose assignees located them upon the public lands hereinafter described, which had not been recovered by the said John McEnery under the contract entered into by and between the then Governor of the State, for which patents were thereafter illegally and fraudulently issued to some of said assignees, while others stood upon their certificates (scrip."

Now, if this allegation means anything, it means that when John McEnery made the recovery of the land the Register issued to him certain scrip or certificates; that this scrip or these certificates he sold, and that some of the purchasers of this scrip located it on the public land and got patents, while others stood upon their scrip—i. e., made no attempt to locate their scrip at all. There are then two classes of people, according to the petition: Those holding patents to the land and those holding the McEnery scrip which has not been located on any land. All those who made entries received patents. Those who stood upon their scrip made no entries or applications of any kind to enter; their scrip is not identified with any particular land; and, hence, are not concerned in this suit, or, as the Supreme Court of the State put it:

> "The word "certificate' is used throughout the petition as synonymous with scrip, and we cannot understand how a mere warrant locatable on any public land can be considered as the equivalent of a certificate of entry or receiver's receipt, showing that the applicant has paid for a particular tract of land and is entitled to a patent therefor."

In other words, the Supreme Court of Louisiana holds, and it is a question of pure Louisiana local land law, and is a fact that, in Louisiana, a certificate of entry or final receipt is one thing and a scrip certificate or piece of scrip is an entirely separate thing, and that Court holds that Frellsen alleged that persons who acquired McEnery scrip are divided into two classes: (1) Those who made entries and got patents; and, (2) Those who never located

their scrip at all, but simply held or "stood on" it.

The petition is dealing only with lands concerning which an entry has been made, and, hence, is not, and can not have any reference to those parties who simply stood on their scrip. Those who stood upon their McEnery scrip have never located it upon any specific public land, and, hence, could nowhere come in conflict with Frellsen & Co., who are claiming rights as to certain specifically-described land. On page 13 plaintiff made the further allegation:

> "Petitioners aver that in every case the lands herein described were **entered** with illegal McEnery scrip or certificates heretofore set out, and the patents that were issued therefor—**i. e.**, the patents that were issued in every case—refer upon their face either to Act No. 23 of 1880, or to the certificate number, which certificate showed upon its face it was issued under Act 23 of 1880, and said certificates (scrip) and said patents were, and are, absolutely null and void, illegal and of no effect." [Parenthesis by present writer.]

The foregoing is so conclusive against plaintiff that he is driven to extremity, and we find him in his brief clutching at a straw. He quotes his allegations of page 13, reading:

> "Petitioners aver that the Register of the Land Office refused petitioner's application and tenders on the **grounds stated** in his written refusal, made part hereof, to-wit: That said lands had been theretofore entered or patented to others."

And seriously contends that this is to be construed, not as an allegation of fact made by the Register, and quoted by plaintiff in order that it might be combatted and disproven, but an allegation of fact adopted by plaintiff, fathered and seconded by him, and made his own. It is obvious that the intent to father and adopt this allegation was an intent born of the exigencies of the situation in which plaintiff finds himself by his failure to make necessary allegations; and it is also evident that by adopting, as his own allegations the allegations of the Register, plaintiff would escape Scylla only to encounter Shipwreck on Charybdis; for if he adopts these allegation at all and fathers them and seconds them as his own, he adopts them at their face value, and he would be in the position of alleging as the Register undoubtedly did allege when he declined the application to-wit: "That all the land described in the petition has been heretofore **entered or patented and hence is no longer open to entry.** To adopt such an allegation would have the effect of putting plaintiff out of Court, for the reason that if he admits that when his application was made, the land was no longer open to entry, but was segregated by a prior entry, he admits that he acquired no vested right by his application.

Equally fallacious is plaintiff's further argument, when he seeks to explain the allegation of page 13, reading:

> "Petitioner avers that in every case the lands described were entered with illegal McEnery scrip,

> or certificates heretofore set out and the patents that were issued therefor refer upon their face. * * *"

A clause which logically and grammatically means "Petitioner avers that in every case the lands described were entered with illegal McEnery scrip or certificates, heretofore set out, (i. e., scrip heretofore described), and the patents, etc."

By stating that he meant to allege:

> "Petitioner avers that in every case the lands described were entered with illegal McEnery scrip or certificates **as** heretofore sent out (i. e., in the way in which I have set it out)."

Unfortunately for plaintiff, that fatal "as" was omitted. It is indispensably necessary to give the sentence the meaning now sought to be thrust upon it. Without it the sentence has no such meaning, but has and can have only the meaning given **supra.**

In this brief plaintiff confesses his own weakness. He says:

> "In explanation of the statement in the opinion of the Supreme Court of Louisiana to the effect that the word 'certificate' in the petition is used as synonmous with 'scrip' we have to say that an examination of a McEnery certificate issued by the Register of the Land Office will show that when it was 'located' an endorsement or certificate of entry was made on the back or reverse.
>
> "Therefore, in fact the original McEnery certificates became certificates of entry and were one and the same thing. That is why the petition uses the

word 'certificate' in a double sense, as McEnery certificates, and as certificates of entry, it being easily discernible which is meant by the context."

Counsel closes his argument with the above two paragraphs, which may be freely translated to mean: "Anyhow, even if I did say they stood on their scrip: Scrip and 'Final Receipts' mean the same thing, so it doesn't make any difference."

We are unable to concur with counsel in this view, and we are very sure that this Court is still less able to do so. A piece of scrip is a letter of credit which Government will accept in payment for land; no specific land but any land. A final receipt or certificate of entry is a document wherein Government recites that it has actually received the price of certain specified land; that it has been duly entered and is now segregated from the public domain. As your Honors said in the **Detroit Lumber Company case, 197, U. S.**, so much importance has been given to a final receipt that it seems almost to overshadow the patent itself. As we said above, plaintiff is unable to force upon us the theory that a piece of scrip and a final receipt are identical. But, says he, the two are identical in Louisiana, because the final receipt is endorsed on the back of the McEnery certificate. Where plaintiff got the facts upon which he relies to support this statement we have been unable to discover. **He certainly did not get them from this record,** or from the allegations of his peti-

tion. But even if it be true, it does not prove his point. To show that page 2, of this brief is written on the back of page 1, is not to show that the two pages are identical, and more than this, whether a piece of McEnery scrip and a final certificate of entry are the same thing under Louisiana law, is a simon pure question of local Louisiana land law, and the Supreme Court of Louisiana has decided that they are **not** the same thing. This decision of the Supreme Court of Louisiana is the final holding of a State Supreme Court passing upon:

1. A local statute.
2. A construction of a local land law.
3. A rule of property.

It is under the decisions cited **infra** conclusively binding upon this Court.

EVEN HAD PLAINTIF ALLEGED CERTIFICATES OF ENTRY, RESULT WOULD BE THE SAME.

It is to be noted that even according to plaintiff's own present theory of his allegations, all this land had either been patented or else had final register's receipts issued against it. And unless we are hopelessly confused in our reading of the decisions of this tribunal, it has been repeatedly held that the issuance of a final receipt or certificate segregates the land from the public domain, and prevents the acquisition of inceptive rights by subsequent entrymen as fully as does the issuance of a patent.

In **Stimson Land Co. vs. Rawson, 62 Fed. 426,** the Court said:

> "The decisions of the Supreme Court of the United States establish the following propositions:
>
> "When land has been sold by the United States and the purchase money paid, it becomes segregated from the body of the public lands, and is no longer the property of the Government, but is the property of the purchaser. **(Carroll vs. Safford, 3 How. 460; Witherspoon vs. Duncan, 4 Wall. 210; Worth vs. Branson, 98 U. S. 118; Simmons vs. Wagner, 101 U. S. 260.)** After a sale, until the patent is issued, the Government holds the mere legal title in trust for the purchaser, and in case of a resale the second purchaser would take the title charged with the trust. **(Carroll vs. Safford, supra; Lindsay vs. Hawes, 2 Black. 554.)**
>
> "When the right to a patent becomes perfect, the full equitable title passes to the purchaser with all the benefits, immunities and burdens of ownership. **(Benson vs. Alta, 145 U. S. 428.)** A contract for the purchase of the public land is complete when the certificate of entry has been executed and delivered. **(Witherspoon vs. Duncan, supra.)** A patent certificate protects the purchaser's rights as fully as a patent. **(Carroll vs. Safford, supra.)"**

McMichael vs. Murphy, 197 U. S. 304:

In this case no patent had issued, merely the certificate of entry, and yet the Court said:

> "The Supreme Court of the territory held that White's homestead entry was **prima facie** valid, and that, so long as Hoyt's entry remained uncancelled of record, it segregated the tract of land from the mass of the public domain, and precluded Mc-

Michael from acquiring the inceptive right thereto by virtue of his alleged settlement.

"We are of opinion that there was no error in this ruling. It is supported by the adjudged cases."

Quoting **113 U. S. 629; 132 U. S. 357; 143 U. S. 32; 158 U. S. 85; 166 U. S. 620; 174 U. S. 622; 193 U. S. 192.**

See, also, Words and Phrases, Vol. VIII, p. 7308, **Vested Right; Am. & Eng. Enc. of Law, Vol. XXVI, p. 390; 12 Cyc. 936; 135 Fed. 233; 107 Fed. 603.**

ARGUMENT.

Succinctly stated, plaintiff avers that the State officials wrongfully issued scrip to McEnery; that McEnery and his assignees entered certain land and paid for it with this scrip and received patents for it. That this scrip was not proper payment for the land. That, thereafter, plaintiff tried to enter the land, but his entry was rejected because the land had already been entered. That he acquired a vested right to the land by his attempts to enter, and that the State could not divest this vested right by allowing the first entryman to perfect his entry.

The argument is based upon the theory that the State of Louisiana is making a continuous open offer for the sale of her public lands; that any member of the public, such as Frellsen, who comes forward and accepts that offer, by his acceptance creates a contract with the State, which contract immediately confers upon the entryman or acceptor certain vested rights. With this proposition of law we are not presently quarrelling. It is obvious,

however, that in order to bring his case within it, Frellsen must show that at the time he stepped out of the crowd and communicated his acceptance, the State's offer was still open. It is obvious, further, that, if some one else had done so before Frellsen and accepted the State's offer on land described as X, the State's offer on land X would no longer have been open to Frellsen. The first question for us to consider then is: Was Frellsen the first acceptor of the States offer—i. e., was he the first entryman? For the purposes of the present hearing the allegations of Frellsen's petition are taken as true and so this question becomes:

HAS PLAINTIFF ALLEGED HIMSELF TO BE THE FIRST ENTRYMAN?

His allegations are as follows (we quote from his petition) transcript, p. 13, et al.:

> "Petitioners aver that they are the first and only applicants for said lands under the provisions of Act 125 of 1902, or of any other law of this State **since the date of the issuance of said illegal McEnry certificates and patents purchased therewith.**" (Page 13.)

> "**Petitioners aver that, accepting the invitation** of the State of Louisiana to make entry to its public lands, they, on March 28, 1905, made applications * * * **to enter the following lands.** (Page 4.)

> "Petitioners aver that the Register of the Land Office refused petitioners' applications and tenders upon the grounds stated in his written refusal made part hereof—to wit: that said lands had been **theretofore entered or patented to others.** (Page 13.)

> "Petitioners aver that, in every case, the lands herein described **were entered** with illegal McEnery scrip or certificates, heretofore set out, and the **patents that were issued therefor, etc.** (Page 13.)
>
> "Now, your petitioners aver * * * that these certificates were sold and assigned by the said John McEnery, whose assignees **located them upon the public lands hereinafter described,** * * * for which patents were thereafter illegally and fraudulently issued to some of said assignees, while others stood upon their certificates." (Page 3.)

Your Honors will observe that petitioner has given specifically the date of his application—to wit: March 28, 1905.

He has specifically alleged that the Register told him that the land had all been entered and patented by other people, and then he spcifically alleges "that, in every case, the lands herein described **were entered** with illegal McEnery scrip or certificates."

He then alleges, that the holders of these scrip certificates "located them upon the public lands hereinafter described * * * for which —(i. e., the public land hereinafter described)—patents were thereafter illegally etc. issued."

Your Honors will observe that plaintiffs have therefore, themselves **alleged** that, long before they ever thought of entering these lands, other parties had **entered them. They nowhere allege any informality or illegality in said ENTRY.**

Their allegation of illegality is confined to the patents; it is found on page 3, is quoted **supra, and reads:**

> "Assignees located them upon public lands hereinafter described, **which had not been recovered by** John McEnery, etc., for which **patents** were thereafter illegally and fraudulently issued to some of said assignees."

Continuing, he states why the patents issued to these prior entrymen are fraudulent and illegal. That reason, say they (p. 4) is because the scrip issued to John McEnery was not proper legal tender money with which to pay for patents to public land, and since these patents were paid for with that spurious coin, they are illegal and fraudulent. Suppose, now, such had been the case. Suppose these lands had been entered twenty years ago and paid for in counterfeit dollars (but dollars which the State officers and all others in interest thought good dollars), and suppose that, at this late date, after the patents had issued, and applicants for same had gone into possession, the counterfeit nature of these dollars was discovered, what would be the situation? Surely the entries or applications under and by virtue of which patents had issued, would still be on file; would still be the first applications and would prevent any subsequent applicant for the same lands from acquiring any vested rights therein. The only question at all would be that purely personal one between the State and these applicants concerning the payment of the purchase price of such lands.

We submit, therefore, that the allegations of plaintiffs' own petition conclusively show that they are not the first entrymen, and, hence, could not have acquired any vested rights in, or to, the lands referred to, and that, having no such vested rights, they have no cause of action to interfere with the state and intervenors in the disposition of the lands here in controversy.

This is no new question. The following cases have passed upon it:

State ex rel. Goodloe vs. Register, 47 An. 568:

> "The next question we are called upon to consider is: Can a party raise objection to the constitutionality of an act whose right it does not affect, and who is without interest. The relator, it is true, has offered to become a purchaser and has made a tender of the price. **As the lands were not in the market, this could not have the effect of vesting him with title.**"

Hastings vs. Whitney, 132 U. S. 361:

> * * * "The entry being made, and the certificate being executed and delivered, the particular land entered thereby **becomes segregated from the mass of public lands**, and takes the character of private property. The fact that such an entry may not be confirmed by the Land Office on account of any alleged defect therein, or may be canceled or declared forfeited on account of noncompliance with the law, or even declared void, after a patent has issued, on account of fraud, in a direct proceeding * * * is an incident inherent in all entries of the public lands."

Page 363:

> "Under the homestead law three things are needed to be done in order to constitute an entry on

public lands. First, the applicant must make an affidavit setting forth the facts which entitled him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. * * * If either one of these integral parts of the entry is defective—that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash—the Register and receiver are justified in rejecting the application; but if, nowithstanding these defects, the application is allowed by the Land Office and a certificate of entry is delivered to the applicant, and the enrty is made of record, such entry may be afterwards canceled on account of these defects * * * But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. **So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grants.**" **(Quoted with approval, Hodges vs. Concord, 193 U. S. 196.)**

James vs. Germania Ins. Co., 107 Fed. 597:

A man entered land with "half-breed Sioux scrip." Entry was attacked and ultimately found void by Secretary. Question of acquisition of vested right by applicant subsequent to said entry and prior to its cancellation by Land Office arose. The Court said (p. 603):

"Turning now to the question at issue, the following proposition will be found to be established beyond controversy. The entry of the land by Straus, with his 'half-breed scrip,' **whether valid or void, segregated it from the public domain** and appropri-

ated it to private use, so that no legal entry could be made of it by James or by any other applicant."
• • • (Citing numerous cases.)

McMichael vs. Murphy, 197 U. S. 304:

Following the adjudicated cases, we are told that White's original entry was **prima facie** valid—that is, valid on the face of the record—and McMichael's entry having been made at a time when White's entry remained uncanceled, or not relinquished, conferred no right upon him, for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain, and made them not subject to entry.

> "While the entry remained uncanceled of record by any direct action of the Land Office, or by relinquishment, could another person by making an entry acquire a right in the land upon which a patent could be based?"

The answer was, no.

A. & E. Ency. of Law, Vol. 26, p. 390:

> "When the authorized officers of the Government have issued a patent **or a certificate** under a land grant equivalent to a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, it will be presumed that all the prerequisites to the issuance of a valid patent or certificate have been complied with, and the title conveyed is impregnable to collateral attack.
>
> "An entry of public lands under the laws of these United States, whether legal or illegal, segregates it

from the public domain, appropriates it to private use and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled and removed."

107 Fed. 603; 113 U. S. 629; 134 U. S. 42; 178 U. S. 85; 164 U. S. 622.

La. Sulphur Mining Co. vs. Krause, 110 La. 694:

"But plaintiff insists that the entry by Escoubas in 1861 is to be considered null **ab initio** for the reason that the price paid (25 cents per acre) was below that fixed by law for the sale of such lands.

"The contention is that the action of the land officials in selling below the minimum price (which plaintiff contends was, for the land in question, 25 cents per acre) was in violation of a prohibitory law, and, hence, no title was conveyed to Escoubas by the entry **he was permitted to make.**

* * * * * * * * * *

"Such a title as that of Escoubas would, at least, be recognized by the State until set aside regularly or canceled on proof of error on the part of its officials, or error or fraud on part of those entering the land."

In re Emblen, 161 U. S. 56:

In this case the act under which the patent issued was alleged unconstitutional

"The patent conveys legal title to the patentee and cannot be revoked or set side except upon judicial proceedings instituted in behalf of the United States."

Emblen vs. Lincoln Land Co., 184 U. S. 664:

"After a patent has once been issued the original contest is no longer within the jurisdiction of the

Land Department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside except upon judicial proceedings instituted by the United States."

Smith & Wallace vs. Crandell, 118 La. 1052:

"A patent conveys the legal title to the patentee, and cannot be revoked or set aside except on judicial proceedings instituted by the sovereign.

"Where State patents issued in 1881 and plaintiffs in May, 1906, made application to enter the land covered by the patents and tendered the price and charges fixed by law, such application did not vest in the plaintiff any inchoate or inceptive rights to the lands, or give them any standing to sue to revoke such patents on the ground that the lands were illegally purchased for scrip instead of money."

Again in **Chauvin vs. Louisiana Oyster Commission, 121 La. 13,** the Supreme Court of that State, referring to the case of **Smith vs. Crandell, 118 La. —,** declared it had "held that a State patent conveys the legal title to the patentee, and cannot be revoked or set side, except on judicial proceedings instituted in behalf of the sovereign;" and that "the entry of public land, valid upon its face, segregates the tract of land from the public domain," citing **McMichael vs. Murphy, 197 U. S. 304.**

United States vs. Throckmorton, 98 U. S. 70:

Referring to the fact that the Attorney General of the United States alone should be authorized to bring suits to annul patents issued by the Federal Government, the Court says:

"The reason of this is obvious—namely, that in so important a matter as impeaching the grants of

the Government under its seal, its highest law officer should be consulted and should give the support of his name and authority to the suit. He should also have control of it in every stage, so that if, at any time during its progress he should become convinced that the proceeding is not well founded or is oppressive, he may dismiss the bill."

McLoughlin vs. United States, 107 U. S. 526:

In this case the Court went so far as to deny that a United States District Attorney could bring suit to annul a patent issued by the general government, holding that the Attorney General alone should have such authority.

See, also, **Western Pacific vs. United States, 108 U. S. 510,** and **U. S. vs. San Jacinto Tin Co., 125 U. S. 223.**

United States vs. Stone, 2 Wall. 535, the Court said:

"A patent is the highest evidence of title and is conclusive as against the Government and all claiming under junior patents or title, until it is set aside or annulled by some judicial tribunal."

Mowry vs. Whitney, 14 Wall. 439, the Court said:

"We are of the opinion that no one but the Government, either in its name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the Government has issued to an individual."

Smelting Co. vs. Kemp, 104 U. S. 647, the Court said:

"It does not lie in the mouth of a stranger to the title to complain of the action of the Government

with respect to it. If the Government is dissatisfied it can, on its own account authorize proceedings to void the patent or limit its operations."

Yosemite Valley Case, 15 Wall. 93, the Court said:

> "The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of a **legal right to the land** occupied by him as against the owner (the United States); and the acquisition by him of a **legal right as against other parties to be preferred in its purchase,** when the United States had determined to sell. It seems to us little else than absurd to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquired a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

See, also, **Cooley on Constitutional Limitations, page 199; 159 U. S. 491; 199 U. S. 578.**

Plaintiff relied, in the lower Court, upon the case of **Penoyer vs. McConnaughty, 140 U. S. 1.** When, however, your Honors examine this case, you will find that the land concerning which the contest arose had not been disposed of by the Government to any one else, and that McConnaughty was the first applicant for the same. No question arose in that case concerning the right of a private individual to attack or seek to set aside a patent issued by the State. All that was contended for there was as to the right of McConnaughty, who had made ap-

plication for land that could be disposed of, and who had done everything required of him by the statute.

When your Honors analyze that case thoroughly, you will see that the real question involved, and the one which was determined, was as to whether a suit brought against certain officers of the State of Oregon was a suit against the State. That was the real point at issue and the only one decided in that case, although the Court took occasion in reaching its conclusion to argue concerning what does and what does not constitute a vested right. In the case at bar, however, plaintiffs are mere strangers to the title. They have never had any right of the Government conferred upon them, and they occupy the precise position which was referred to in the case of the **Smelting Company vs. Kemp**, where this tribunal said:

> "It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it.
>
> "The **Emblen cases** in the United States Supreme Court are important upon this point, and present so clearly the analogous feature of a remedial or curative legislative act, as to be entitled to special notice; and so, although we have quoted them **supra**, we will refer to them once more:

In Re Emblen, 161 U. S. 52:

> "Weed obtained an entry certificate of purchase, entitling him, in due course, to a patent for the land. Before any patent was issued Emblen filed a protest in the Land Office, charging fraud, misrepresentation and perjury on Weed's part, and demanding a hearing as contestant. The decision of the Land

Office having gone against Emblen, he applied for and obtained a rehearing. Before such rehearing was had, and, consequently, pending the proceedings in the Land Office, Congress passed an act confirming Weed's entry and directing that a patent issue to him for the land. The patent was issued and then the Land Office declined to entertain any proceedings in the land contest, whereupon Emblen sued out a writ of mandamus to the Secretary of the Interior to hear and decide his contest, praying to have the act of Congress declared unconstitutional and void, and that the Secretary of the Interior be required to proceed to final adjudication and disposition of the contest. The Court denied the application and in its opinion said:

"'It is quite clear that (even if the act of Congress is unconstitutional, which we do not intimate), the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the Land Department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once issued, the original contest is no longer within the jurisdiction of the Land Department.'" Citing many cases.

In **Emblen vs. Lincoln Land Co., 184 U. S. 660,** a bill in equity was filed by Emblen against the Lincoln Land Company, and others, as suggested by the Court as the only possible remedy in the case already cited, and the Court held:

"While a contest for a pre-emption entry was pending, Congress passed an act confirming the entry and directing the patent to issue, which was done. **Held:**

That the act was within the power of Congress, and that its operation could not be defeated by a contestant who had never made an entry on the land nor perfected the right to do so.

Chief Justice Fuller, in deciding the case, said:

"The question arises whether it was within the power of Congress to exercise control over the land and direct, as it did, the issue of the patent to Weed, and that depends upon whether Emblen had obtained a vested right in the land before the passage of the act of December 29, 1894, as otherwise the power of Congress over its disposition as public land was plenary."

Citing **Frisby vs. Whitney, 9 Wall. 187; Shepley vs. Cowan, 91 U. S. 330; Bickston vs. Fraizer, 130 U. S. 232; Gonzales vs. Freack, 164 U. S. 345.**

"The Weed entry" (says the Chief Juctice) "had not been cancelled when the Act of 1894 took effect, so that Emblen **had no right to make entry under the Act of May, 1884.** The jurisdiction of the Land Department ceased with the issue of the patent, and the power of Congress to direct the patent to issue was unaffected by the **possibility** that Emblen, if he had been permitted to prosecute his contest, might have succeeded."

It is to be noted that Emblen's protest, if successful, would have given him a private claim to enter; and that he had everthing in the way of entering that the law allowed, which was to protest just as Frellsen has protested.

The State of Louisiana has the right, in her own discretion, to sue or not to sue to annul the patents issued by

her, and until she has exercised that discretion and has acted in the matter, and brought back, as part of the public domain, land which she may have patented, no individual can be said to acquire a right, much less a vested right, to lands so patented. The State has the right also, when she does bring back these lands, to announce who will be regarded as first applicants for them.

In this connection, we desire, at this time, to call the attention of this Court to the language of Acts Nos. 85 and 86 of the General Assembly of the State of Louisiana, approved July 6th and 7th, 1906, respectively. The title of Act No. 85 of 1906 contains the declaration

> "that present holders and owners of patents for public lands, issued by the State of Louisiana, their heirs, assignees or transferees, **shall be confirmed as applicants** for said lands **from the date of the issuance** of said patents, where the said patents were not paid for in money, but were paid for by certificates or warrants for script, which were not legally receivable in payment for such patents, and authorizing such present holders and owners, their heirs, assignees or transferees, of said patents, to **validate and perfect** their title to the lands covered by said patents, or to any part or subdivision of such lands, within one year from date of passage of this act, by paying therefor in cash the price of one dollar and fifty cents per acre." (Our black-letter.)

This act declares that all persons holding patents from the State of Louisiana for lands which had been paid for with certificates or warrants for scrip "which, for any reason, was not legally receivable in payment for such

patents," their heirs, assignees or transferees, would be regarded and

> "**confirmed as applicants** in the State Land Office for the lands covered by such patents, or for any part or subdivision of such lands, **from the date on which said patents were issued,** and shall be entitled to **perfect and validate** their titles to the lands covered by their patents * * * within one year * * * by paying in cash to the State the price of one dollar and fifty cents per acre; * * * and, on making said payments, the said patents shall be valid and legal for all purposes, **as if payment therefor had been made in cash at the date of their issuance.**" (Black-letter ours.)

Act No. 86 of 1906 treats the subject of certificates of entry for public lands of the State of Louisiana and provides that the holders and owners of certificates of entry,

> "purporting on their face to have been paid for by certificates or warrants * * * for scrip, which scrip for any reason, was not legally receivable in payment for such certificates of entry * * * their heirs, assignees or transferrees, **shall be confirmed** as applicants in the State Land Office for the lands covered by such certificates of entry * * * **from the date on which said certificates of entry were issued, and shall be entitled to perfect and validate their titles** to the lands covered by their certificates of entry, within one year from date of passage of this act by paying in cash to the State the price of one dollar and fifty cents per acre; * * * and, on making said payments, the said certificates of entry shall be valid and legal for all purposes, **as if payment therefor had been made in cash at the date of their issuance.**"

It will thus be observed that the State of Louisiana, which had the undoubted right to declare what should constitute an application for any of her public lands, and who should be regarded as first applicants for the same, has announced, through the General Assembly of that State, in and by these two Acts, Nos. 85 and 86 of the year 1906, that all persons whose applications had been paid for in scrip not legally receivable, should be regarded as the first applicants for the lands applied for by them.

The State of Louisiana, having thus recognized and declared the intervenors in this suit, and all others similarly situated, to be ahead of plaintiffs, as first applicants for the lands sought to be acquired by the latter, on their paying to the State, within one year, from and after the respective dates of the passage of said acts, the sum of $1.50 per acre, which is the price fixed by the laws of the State of Louisiana at which her public lands, of like kind and character, may be sold, it puzzles us to understand the process of reasoning by which plaintiffs would have this Court hold that they have acquired any vested rights in and to the lands described in the petition filed in this suit.

The State of Louisian is alone entitled to complain of her public lands having been illegally disposed of, and she alone would have the right to sue to annul the patents and the certificates of entry referred to in Acts Nos. 85 and 86 of 1906. So far, however, from the State manifesting a disposition to disturb the holders of such patents and certificates of entry, she has declared. on the

contrary, that she will regard them, as well as their heirs, assignees and transferees, as first applicants for the lands described therein, on their paying $1.50 per acre for the same, within one year from and after the date that these Acts, Nos. 85 and 86, were passed, and that, on such payments being made, such patents and certificates of entry

> "shall be valid and legal for all purposes, as if payment therefor had been made in cash **at the date of their issuance.**"

We are at a loss, therefore, to understand what rights of plaintiffs have been interfered with by those two acts of the General Assembly of the State of Louisiana, or in what respect they would deprive them of any vested rights in or to the property described in their petition.

VOID ON THEIR FACE.

Plaintiffs admit that here were other entries made prior to their entry, but contend that these prior entries resulted in illegal patents, hence, their entry is the first one. And they cite authority to support the proposition that a patent which is void on its face may be collaterally attacked. None of the authorities cited, as far as we have read them, hold specifically that a patent void on its face fails to segregate the land from the public domain. However, we need not discuss that point presently, because plaintiffs have not alleged that the outstanding patents to this land are void on their face. We might preface these quotations by saying that for the purposes of the present hearing, plaintiffs' allegations of fact are taken as true, but his allegations and conclusions

of law and legal results of these facts are open to dispute. **8 La. An. 145; 124 La. State vs. Hackley, 772 La. 772; 31 Cyc., 33, 48 An. 631; 50 An. 266.** Plaintiffs have alleged, page 3:

> "Petitioner further avers that the hereinafter-described lands were not embraced in the lands recovered by said John McEnery, and were not recovered by him to the State under the aforesaid contract, and that the issuance to him, as aforesaid, by the Register of the State Land Office, of said certificates, as compensation for the recovery of other lands to the State, under the provisions of said contract, was illegal, null and void, and **ultra vires**, as neither the Governor nor the Register of the State Land Office had any right to issue, or consent to the issuance of, such certificates, and that said certificates conferred no right upon said John McEnery or his assignees in and to the lands located therewith; that the patents granted thereunder are null and void and ultra vires, and neither theissuance of the certificates nor the granting of the patents had the effect of segregating the lands, purporting to be conveyed, from the public domain.
>
> "That these certificates and these patents are absolutely null and void, and did not divest the interest and title of the State in or to said lands.
>
> "That the lands which they purport to convey never became segregated by such conveyance from the public domain, but remained subject, as such public lands, to sale and entry, under existing laws, by the first applicant therefor."

Page 13:

> "Petitioners aver that, in every case, the lands herein described were entered with illegal McEnery scrip or certificates, heretofore set out, and the pat-

ents that were issued therefor refer, upon their face, either to Act No. 23 of 1880, or to the certificate number, which certificate showed upon its face it was issued under Act 23 of 1880, and said certificates and said patents were, and are, absolutely null and void, illegal and of no effect."

And the allegation is made on page 4, not that the certificates showed on their face that they were locatable on any land of the State, and, hence, null, and that, as a matter of fact, they were locatable on any land, and for that reason were null.

The foregoing comprise absolutely all the allegations of the petition on this subject. We challenged counsel for plaintiff in the Courts **a quibus** to point out where, in his petition, he had alleged these patents to be void on their face, and he pointed out, on page 19 of his brief in the State Supreme Court, the foregoing quotation from page 13.

Let us stop now and analyze the allegations thus relied on. It is that patents issued, and that either the patents referred, on their face, to Act 23 of 1880, or referred to a certificate, and that, if one looked up the certificate (**de hors** the patent) he would find on it a reference to Act 23 of 1880.

Let us note now four things:

(1) The patents were issued by the Register and the Governor. It is not denied, and it cannot be denied, that the Register and the Governor had authority to issue patents for these particular lands, if legal tender money

or scrip were paid for them. Plaintiff is asking these same officers to issue such patents right now.

(2) It is not denied, and it cannot be denied, that John McEnery was entitled to some scrip. **42 An. 209**, opinion of Louisiana Supreme Court, transcript, p. 89:

> "In our opinion we referred to the case cited (**42 An. 209**) for the purpose of showing that under the contract made pursuant to Act 23 of 1880, scrip and patents might have lawfully issued to John McEnery for his interest in lands **actually recovered** by him for the State of Louisiana."

(3) It is not denied, and it cannot be denied, that the scrip to which McEnery was entitled was good legal tender money, properly receivable in payment for the lands he recovered. **42 La. An. 209.** Opinion Louisiana Supreme Court, rehearing, quoted **supra**, transcript, p. 89.

(4) Act 23 of 1880 authorized McEnery to recover for the State, and, hence, entitled him to scrip for, one-half of "lands situated in the State of Louisiana and donated by several acts of Congress to the State for divers purposes" (Vid, of transcript, p. 34). The lands in controversy are alleged by plaintiff (page 1) to have been donated to the State by Congress; therefore, these identical lands might have been recovered by McEnery from the United States.

With these premises before us, let us turn back to the allegations relied on by plaintiffs as a statement by them that these patents were void on their face. They are that the patents refer, on their face, to Act 23 of 1880, or to a certificate or scrip number, which scrip showed on its face

it was issued under Act 23 of 1880. Let us first take the case of the patent referring to Act 23 of 1880. This reference on the face of the patent would charge one with notice that the patent had come through Act 23 of 1880. If every patent issued under Act 23 of 1880 were alleged to be void, it might well be argued that a reference to that fatal act would render a patent void on its face, but such is neither the fact nor the allegation. **It is not denied that some good patents could issue under that act.** In fact, in **42 La. An. 209**, the Supreme Court of Louisiana actually made mandamus peremptory ordering the issuance of certain patents under that act. Hence, when one received a patent referring to that act he would, according to plaintiff's own contention, be called upon to investigate and to discover "whether the land covered by the patent had or had not been recovered by Mr. McEnery." Surely, it cannot be contended that that information appeared on the face of the patent. No patent has been alleged to have had written across it the legend, "which land was not recovered by McEnery." The land patented was land of the same character as that recovered by McEnery—namely, "lands situated in the State of Louisiana and donated by several acts of Congress to the State for divers purposes." And so, when a person received a patent, what course would he pursue? He would look at Act 23 of 1880 and find that McEnery was authorized to recover, and probably did recover, portions of all the various kinds of land; hence, he might have recovered the land embraced in the patent. He would look at the decision of the highest tribunal of the State: **McEnery vs.**

Nicholls, 42 La. An. 209, construing that statute, and find that that tribunal found that statute constitutional, legal and binding; he would find that the Governor and Register not only were authorized to issue patents for land under that act, but would be compelled by mandamus to do so, and had been so compelled to issue patents under that particular act by the highest tribunal in the State. In order, therefore, to discover whether the patent in his hands was good, an individual would, according to the allegations of the petition of this plaintiff, be obliged to get from somewhere a list of all the land recovered by McEnery and check same over so as to see whether the land covered by his patent were on it. **Not only, therefore, was the patent not void on its face,** but its validity **vel non** was a matter which could be determined only by intricate research. The position created by plaintiff's allegation then is, that these patents were good or bad, according as the land embraced within them was land recovered by McEnery or not, and the patent did not, on its face, supply that information. That information was **de hors** the patent, and the alleged invalidating information being **de hors** the patent, the patent is valid on its face. Nor is the situation any better if the patent referred on its face to a certain certificate number and the certificate referred to Act 23 of 1880. In fact, the situation was only one degree worse, in that it compelled the holder of the patent to look first to the certificate to get the information that same came through Act 23 of 1880, and having obtained that information he was exactly in the situation

of the holder of a patent which refers on its face to Act 23 of 1880, for he would look at Act 23 of 1880 and find what the Supreme Court of the State found in the **McEnery-Nicholls case, 42 La. An. 209,** that McEnery, under Act 23 of 1880, was entitled to certificates, and that he was entitled to locate those certificates on certain land of the State of the same kind and character as that covered by the patent in question, and just as in the case of the patent holder, the certificate man would be compelled to look **de hors** the entire record to discover whether or not the land covered by his patent and certificate was included in the list of lands recovered by McEnery.

McMichael vs. Murphy, 97 U. S. 304:

> "A settlement or entry on public land already covered of record by another entry valid upon its face does not give a second entryman any right in the land, notwithstanding the first entry may subsequently be relinquished or ascertained to be invalid by reason of facts **de hors** the record of such entry."

Jenkins vs. Gibson, 3 An. 204:

Patent attacked on ground that alleged settler had not lived on land. Held this was **de hors** the record, and patent valid on its face and not subject to collateral attack.

See how close the analogy is to this case. There, by proving that the settler did not live on the land, he can (soidisant) avoid the patent. Here by proving that McEnery did not recover the land he can (soi disant) avoid the patent. There, no collateral attack was allowed. Here, shall it be permitted?

In its final analysis plaintiff's contention is what? It is that McEnery scrip was used to pay for land, and that McEnery scrip is counterfeit money. He is rather in the position of a person who alleges that the purchaser and patent holder of State land paid for it in counterfeit greenbacks. Our answer is that such is not an invalidity as appears upon the face of the patent, and that, therefore, the patents are valid on their face and, being so, segregate the land from the public domain, and leave objector without interest in the matter, or cause or right of action to have said patents annulled. **(Smith & Wallace vs. Crandall, 118 La. 1072; McMichael vs. Murphy, 197 U. S. 304)**, and we are confirmed in this belief by what happened in the **McEnery vs. Nicholls case 42 An. 209.** In that case apparently McEnery came before the Court with some of this scrip (not here alleged void on its face), and asked for a mandamus to compel the Governor and Register to deliver patents to him, and this Court not only failed to note that the scrip was void on its face, but they made the mandamus peremptory and ordered the patents to issue. And what we seriously ask this Court to consider is:

> "How did it happen, if these certificates be void on their face, and patently invalid, that the five Justies of the Supreme Court of Louisiana not only failed to notice such invalidity, but ordered patents to issue?"

AS PLAINTIFFS ASK FOR NO RELIEF, THIS IS A MERE MOOT CASE.

Plaintiffs in this proceeding pray only to have the act declared unconstitutional, and for an injunction to restrain the Register of the Land Office from carrying out the provisions of that act. They do not ask to have the outstanding patents or certificates declared void. They do not ask that patents ultimately issue to them or that their applications therefor be recognized. **In fact they ask for no relief or benefit for themselves.**

The question is, therefore, a purely academic one, and the case, a moot case, which, if decided in favor of plaintiffs, could decree nothing in their favor.

> "An action can only be brought by one having a real and actual interest **which he pursues.**" * * *
> **Code of Practice of La., Art. 15.**

It does not help the plaintiffs to show that they have averred they made applications for the land, and, therefore, have the right to ask that the act be declared unconstitutional. They must not only have an actual interest, but must, in the proceedings brought, pursue it—"which he pursues"—is the language of the Code of Practice.

One must have a right and interest to sustain the plea of unconstitutionality of the law.

> **Moore vs. New Orleans, 32 An. 727; N. O. Gas Light Co. vs. Hart, 40 An. 474.**

> "A law unconstitutional because it impairs the obligations of contracts, is only null so far as the rights of those persons are concerned the obligations of

whose contracts are thereby impaired. As to **all other rights** and all **other** persons, it is entitled to full force and effect."

Moore vs. City of New Orleans, supra; Baker vs. Braman, 6 Hill 47.

No other interest is shown by plaintiffs in injunction not the owner or otherwise interested in the property seized.

Lewis vs. Savings Institution, 33 An. 1463; 3 An. 593.

Or attempting to control administration of assets.

Mudge vs. Commissioners, 10 R. 460.

The only decree that this Court can render in this case is one declaring Acts 85 and 86 of 1906 unconstitutional as violative of the Federal Constitution, and enjoining the Register of the State Land Office from accepting $1.50 per acre for the lands described.

This did not escape the notice of the Supreme Court of Louisiana, for, in its opinion (Rec., p. 84), it says:

"Plaintiffs took no legal proceedings against the Register to compel him to accept the price and to issue the proper certificate of entry."

Cui Bono? Non constat, that plaintiffs will ever claim the lands. If their prayer is granted, the State cannot receive the money which certain parties are about to pay her (as averred in the petition), and yet plaintiffs themselves may never take the lands, and do not ask the Court to recognize in them any right whatever in, to, or against, such land.

VI. *

Restitutio in Integrum Non Fit.

It is to be observed that the petition of the plaintiff attacks the title of the patentees of the land. There is no effort to return to the patentees the values which they paid; no suggesion that any such return of value should be made. Throughout the entire petition there is a complete disregard of the equitable doctrine of **restitutio in integrum.** The scrip received by McEnery or his certificates, undoubtedly had a value. The owners of that scrip or those certificates, the assignees of McEnery, parted with that value when they acquired the lands and the plaintiff now proposes to take away from the patentees their lands, without restoring to them the value which they paid.

In connection with this, we direct attention to the language of the Supreme Court of Louisiana, record, page 84, as follows:

> "Conceding that such scrip was illegal, nevertheless, the State received some consideration for the patents, because the scrip so located operated as a relinquishment by John McEnery of his interest in the same number of acres of land recovered by him under his contract. The State for more than a quarter of a century acquiesced in the issuing of patents based on McEnery scrip and took no adverse action until 1906, long after the lands represented by the patents had passed into the hands of third persons."

*Point VI is urged on behalf of Intervenors solely and is not concurred in by counsel for the State of Louisiana.

That is to say, the lands represented by the patents have been sold by the State to other parties and could not now be delivered to John McEnery, his heirs or assigns, even if it were necessary.

This we advance as a corollary to the proposition that only the State can institute proceedings to annul the titles, and the State, if it sought to annul the patents, must restore the patentees to the situation in which they were before they parted with their certificates. This being impossible, even the State has placed itself in such a position that it has no right now to institute an action of rescission. Much less, therefore, can a third party such as the plaintiff in this proceeding, do so.

State vs. Hoerly, Hunn & Joyce, 124 La. 772 (50 So. 772).

QUESTION RES JUDICATA.

This brings us to the petition herein for writ of error, page 90. That petition was filed by the original plaintiff and contains this allegation:

> "That the entry of the lands in question with certificates that were null and void on their face, and which entry could only be made under Sections 4 and 5 of Act 75 of 1880, after actual money had been paid into the State Treasury, was and is absolutely null and void, being in defiance of said Sections 4 and 5 of Act 75 of 1880, and in those cases where patents were issued on such certificates, as shown on the face of the patents, such patents were, and are, absolute nullities, * * * and do not segregate the lands from the public domain."

Plaintiff says, in so many words: If a man pays for land entered under Act 75 of 1880 with a certificate received under Act 23 of 1880, the certificate is void; the entry is void and the patent does not segregate the land from the public domain.

Obviously, the questions presented are pure questions of construction of State Statutes, affecting public lands and constituting rules of property. Whether a certificate issued to John McEnery under Act 23 of 1880 is valid, void or voidable, turns entirely on the construction of Act 23 of 1880. Whether the use of such a certificate as the purchase price of public land entered under Act 75 of 1880 is valid, voidable or void, turns entirely(even according to plaintiff), on the construction of a State statute (Act 75 of 1880), affecting public lands and constituting a rule of property. Plaintiff alleges that certain persons have done thus and so, and that their actions were not sufficient compliance with Act. 75 of 1880, to segregate the land from the public domain. The Supreme Court of Louisiana has construed the Louisiana statute in question and has held that in doing so, these persons sufficiently complied with that statute to segregate the lands from the public domain. Your Honors are asked to review and reverse this finding.

The rule, as we understand it, was early laid down by Chief Justice Marshall, that in the following cases, among others, the Supreme Court of the United States would be **governed** by the ruling of the State Court:

1. When the State Court was construing its own statute.

2. When the State Court was promulgating a rule of property.

3. When the State Court was dealing with the public lands of the State.

On this subject the decisions are as follows:

131 Fed. 689, Circuit Court of Appeals, Sixth Circuit, Richards, Judge:

> "Where an action in the Federal Court depends upon the construction of a State statute providing for the sale of State lands, the Federal Court is required to adopt the construction placed on the statute by the highest Court of such State."

In the body of this case, the Court reviewed the jurisprudence of Kentucky construing a statute of that State. and finally said:

> "Whatever view we might be disposed to take of the proper interpretation of this act with respect to the matter involved in this case, if it were before us as an original question, our examination of the foregoing cases decided by the Court of Appeals of Kentucky constrains us to the conclusion that that Court in the exercise of its rightful authority has settled its construction and settled it in favor of the validity of the patent before us. The judgment of the lower Court is, therefore, reversed."

At page 690 they said, after quoting the statute:

> "The construction of this statute, the ascertainment whether it does or does not prohibit the issue of a patent for more than 200 acres, is obviously a Kentucky question. The Federal Courts follow the rule laid down by Chief Justice Marshall in **Polk's Lessee vs. Wendall, 9 Cranch, 87:**

"'In the cases depending on the statutes of a State, and more especially in those respecting title to land, this Court adopts the construction of the States where that construction is settled and can be ascertained."

Polk's Lessee vs. Wendall, 9 Cranch, 98, as quoted **supra.**

Manley vs. Park, 187 U. S. 547:

"The construction given by the Supreme Court of Kansas to the Kansas statutes, holding that real estate situated in that State, the title to which was vested in a nonresident executor to whom letters testamentary had been issued by a Court of another jurisdiction, may be attached and sold in an action of debt against the nonresident executor, is binding on this Court. And, treating the statutes as having such import as a decision upon a matter of local law, this Court must determine whether, as so constructed, they violate the Federal right involved."

Applying this doctrine to the case at bar this Court would say:

"The local Supreme Court has held on a matter of local land law that the two acts of 1880 were not so violated as to make the patents issued thereunder void on their face, and the land was therefore segregated from the public domain. Taking this construction as a fact, and finding that at the time of Frellsen's entry the land was segregated from the public domain, we are asked to discover whether by his entry Frellsen acquired any vested right, and if he acquired such a vested right, whether the State's action in permitting the entryman whose entry had segregated the land to perfect that entry was a deprivation of Frellsen's vested right in violation of the Constitution of the United States."

Iowa Life Ins. Co., vs. Lewis, 187 U. S. 336:

"This Court will adopt the construction of the State Courts of a State statute as to the necessity of a demand being made before the commencement of an action."

Y. & M. V. R. R. Co. vs. Adams, 181 U. S. 581:

"Held that as the Supreme Court of Mississippi had decided that all the taxes had accrued after the consolidation of October 24th, and the company had thereby lost its exemption, and as this was the construction of the general tax laws of the State which were complex and difficult of interpretation, this Court would accept that construction and deny the petition for a rehearing."

Cargill vs. Minnesota, 180 U. S. 453:

"Held that the highest Court of the State having decided that the provision requiring a license was separable from other provisions, it was the duty of the Federal Court to accept that interpretation of the statute."

Hoge vs. Magnes, 87 Fed., 357, The Court said:

"In construing State statutes relative to titles to land, the Federal Courts follow the decision of the highest judicial tribunals of the respective States in which the lands are situated."

Christy vs. Pridgeon, 4 Wall. 203, the Court said:

"This law of 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas after the independence of that country, a local law of the new State—as much so as if it had originated in her Legislature. It had at the time no operation in any portion of what then constituted the United States. The interpretation

therefore placed upon it by the Federal Court of that State **must**, according to the established principles of this Court, be accepted as the true interpretation, so far as it applies to titles to lands in that State, whatever may be our opinion of its original soundness. Nor does it matter that in the courts of other States carved out of territories since acquired from Mexico a different interpretation may have been adopted. If such be the case, the Courts of the United States will in conformity with the same principle, follow the different rulings so far as it affects titles in those States. The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other. That the statute laws of the States, says Mr. Justice Johnson, in delivering the opinion of this Court, in **Shelby vs. Guy, 11 Wheat, 367,** must furnish the rule of decision of this Court as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own Courts makes in fact a part of the statute law of the country, however we may doubt the propriety of that construction."

In the case at bar then, this Court is trebly bound by the decision of the State Supreme Court because that Court was construing its own Statute, enunciating a rule of property, and dealing with the public land of the State. The State Court was passing on the question

whether the State's public lands had been withdrawn by the State from sale, had been segregated from the public domain; whether a local statute had been observed or had been so disregarded as to strike the proceedings with nullity, all of which was a matter of purely local concern, a local statute, local public lands, a local rule of property: an ideal illustration of a case in which the decision of the local tribunal should be followed. The State Court said in its opinion, Tr., p. 89:

> "In our opinion we referred to the case cited for the purpose of showing that under the contract made pursuant to Act 23 of 1880, scrip and patents might have lawfully issued to John McEnery for his interest in lands actuallly recovered by him for the State of Louisiana. Our conclusion was that the mere reference in patents to Act 23 of 1880 did not show that the same had been issued in violation of law. But the gist of our decision is that patents having issued, the lands were thereby segregated from the public domain and were no longer subject to entry. There is no authority or precedent that would warrant this Court to decree such patents to be null and void in a collateral proceeding to which the present holders of the patents are not parties. Our understanding of the law is that only the State can sue to cancel or annul such patents issued at a time when no third persons had any inceptive right, legal or equitable, in the lands conveyed by such instruments."

In the opinion on the original hearing (p. 84) the Supreme Court of Louisiana say:

> "Boiled down the alleged absolute nullity is that the Register received in payment of the price of the

lands in question McEnery scrip, 'locatable on any public land,' which scrip was issued contrary to the proviso of Act 23 of 1880. * * * * *.

"The alleged nullity is **de hors**, the patents and affects only the consideration received by the State when she parted with the title. If such scrip had been located on lands recovered by John McEnery, the transaction would have been perfectly legal. Its improper location on public lands not so recovered was a matter discoverable only by inquiry and investigation."

The State Court had already held **(McEnery vs. Nicholls, 42 An. 209)**, in 1890, that the Register had a right to issue certificates to John McEnery and same was a rule of property which they thus affirmed, and a ruling on the faith of which those titles had stood and been transferred.

Your Honors are asked to review this finding. You are asked to say to the Supreme Court of Louisiana: Gentlemen, we have construed your local statute and we disagree with you. We find that your Governor had no right to issue scrip-certificates to McEnery. Your ruling to that effect made in 1890, is erroneous and your present ruling following that rule of property is erroneous, and must be upset. We find that your local Act 75 of 1880, was so disregarded that you were wrong in concluding that the patents issued under it by the State officials segregated the State's land from the public domain; the contrary is the case. Those patents are void on their face; we can tell at a glance that they issued for land which McEnery did not recover. Those patents do not segregate this

land fromt he public domain, but, on the, contrary, leave the State of Louisiana continuing to offer them for sale to such an extent that any chance buyer by accepting that offer acquires a vested right in them.

We submit that to state such a proposition is to expose its inherent weakness and destroy its force. Your Honors would make no such finding, even if you doubted the correctness of the State Court's decision, but would say that inasmuch as the point involved the construction by a Louisiana Court of a Louisiana statute governing public lands and constituting a Louisiana rule of property, you would consider that the findings of the Louisiana Supreme Court should be conclusive.

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March, 1910.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 129.

J. W. FRELLSEN & CO., A PARTNERSHIP COMPOSED OF JOSEPH W. FRELLSEN AND JAMES D. HILL, PLAINTIFFS IN ERROR,

vs.

A. W CRANDALL ET AL., REGISTER OF THE STATE LAND OFFICE ET AL.

Brief on Behalf of H. J. Lutcher, W. H. Stark, Jno. Dibert, E. W. Brown, F. H. Farwell, and Vermillion Development Company, Intervenors.

P. PUJO,
J. BLANC MONROE,
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If the Court Please:

On behalf of the undersigned intervenors be it first said that they do adopt and ratify and assume as their own the brief heretofore filed herein by Walter Guion, attorney for defendants, and by the undersigned counsel, among others as counsel, and they do specifically adopt, concur in, and ratify that portion of said brief at page 43 et seq., Chapter VI, entitled and reading:

Restitutio in Integrum non fit.

It is to be observed that the petition of the plaintiff attacks the title of the patentees of the land. There is no effort to return to the patentees the values which they paid; no suggestion that any such return of value

should be made. Throughout the entire petition there is a complete disregard of the equitable doctrine of **restitutio in integrum.** The scrip received by McEnery or his certificates undoubtedly had a value. The owners of that scrip or those certificates, the assignees of McEnery, parted with that value when they acquired the lands and the plaintiff now proposes to take away from the patentees their lands, without restoring to them the value which they paid.

In connection with this, we direct attention to the language of the Supreme Court of Louisiana (Rec., p. 84), as follows:

> "Conceding that such scrip was illegal, nevertheless, the State received some consideration for the patents, because the scrip so located operated as a relinquishment by John McEnery of his interest in the same number of acres of land recovered by him under his contract. The State for more than a quarter of a century acquiesced in the issuing of patents based on McEnery scrip, and took no adverse action until 1906, long after the lands represented by the patents had passed into the hands of third persons."

That is to say, the lands represented by the patents have been sold by the State to other parties and could not now be delivered to John McEnery, his heirs or assigns, even if it were necessary.

This we advance as a corollary to the proposition that only the State can institute proceedings to annul the titles, and the State, if it sought to annul the patents, must restore the patentees to the situation in which they were before they parted with their certificates. This being impossible, even the State has placed itself in such a position that it has no right now to institute an action of rescission. Much less, therefore, can a third party, such as the plaintiff in this proceeding, do so.

State *vs.* Hackley, Hume & Joyce, 124 La., 772 (50 So., 772).

We can not too strongly emphasize the justice of this plea. Our ancestors in title had a letter of credit which entitled them to something. They surrendered that letter of credit to the State of Louisiana and received these lands in lieu thereof. Plaintiff now proposes that the State of Louisiana arbitrarily, and ex parte, take back the land and keep the letter of credit.

We as intervenors most strenuously object to this method of procedure. We insist that the State must first bring against us a suit to set aside this contract; in which suit we will have an opportunity to be heard to set up the reasons which to us seem unanswerable why the State can not set aside these patents at all. And we further insist that even should that suit be decided adversely to our contention, the State must at all events render back what she received before taking back what she gave.

THE POINT OF VIEW OF INTERVENORS.

Intervenors are not John McEnery. They are not even the persons who located the scrip issued to McEnery and caused the patents to issue thereon for the lands in question. *But they are third persons who bought the lands on the public market in the usual course of business, in good faith, paying its full value in cold cash.* They have held this land for from twenty to twenty-five years. During that time the State of Louisiana has assessed it to them, has collected taxes on it from them, and has continuously treated them as its owners.

And now forsooth, comes plaintiff, a rank outsider, a man in nowise connected with the land or the State, a man whose sole motive is land speculation, who desires to buy some 100,000 acres of land for $1.50 per acre and sell it for $30 to $40 per acre, clearing thereby three or four millions of dollars in gain, with which he proposes

to enrich himself at the expense of intervenors, who bought the land for its full market value and at the expense of the State. What proposition does this adventurer advocate?

He urges the State of Louisiana suddenly to change front, to cease to treat intervenors as the owners of the land. To go further than that, *i. e.*, to proceed without *notice to the land holders*, and without affording them a hearing of any sort; to decree by some fell *ipse dixit*; that these solemnly executed patents on the faith of which we have put out our money are void, and that we, our good faith, our vested interests, our years of paid taxes, are without so much as the shadow of a right in the premises.

And why should the State take this action? In order, says plaintiff, to put into my pockets some four millions of unearned dollars. In other words, the State must enter into a broil with the landowner, must go into the public treasury and refund to that landowner twenty years taxes and the original scrip if possible, *things largely exceeding in value the price which* Frellsen proposes to repay to the State. She must do this in order to let Frellsen enjoy this unearned and undeserved gain. The State must contribute to this four millions and these intervenors must make up the deficit even though it be ruinous to them to do so. We submit there is no advantage to the State and no justice to either it or the intervenors in such a proposition, and we submit that the right of plaintiff to insist on such an action does not exist.

Plaintiff insists that the argument that the State must make restitution before setting aside patents issued for value received, is not before the court and hence requires no answer from him. This positionwhich is to be found in his reply brief (p. 22), shows how fallacious the foundation upon which his whole argument rests. He would have your honors hold that the State of Louisiana can

and should disregard our patents and take away our lands before making any restitutio in integrum to us, but when your honors answer him by suggesting that revocation of these patents can in no case take place until restitutio in integrum is made, he replies "your honors can not consider that phase of the legal situation because it was not called to your attention *by the State.*"

Whether it was called to your attention by the State or not, this side of the question is there, and we take it that this court would have discovered it and considered it even though it had been suggested by no one, because this court looks at questions from all sides before finally passing upon them.

And so the contention of counsel that the arguments of intervenor must be disregarded, serves only one good purpose, namely, that of throwing into the spotlight the ex parte nature of plaintiff's proposed action. He would have our patents set aside, our property deeded to others, our right to restitutio in integrum passed upon and invaded without citation to us or notice to us to defend ourselves. And if we come into court and voluntarily suggest that we are entitled to a hearing and to a restitutio in integrum before these things are done, we are told that our arguments and prayers need not be answered and considered, because this is an ex parte proceeding as far as we are concerned and therefore we have no interest in it. Such is not justice. Such is not and can not be the law. Such will not and can not be the finding of this tribunal.

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MARCH, 1910.